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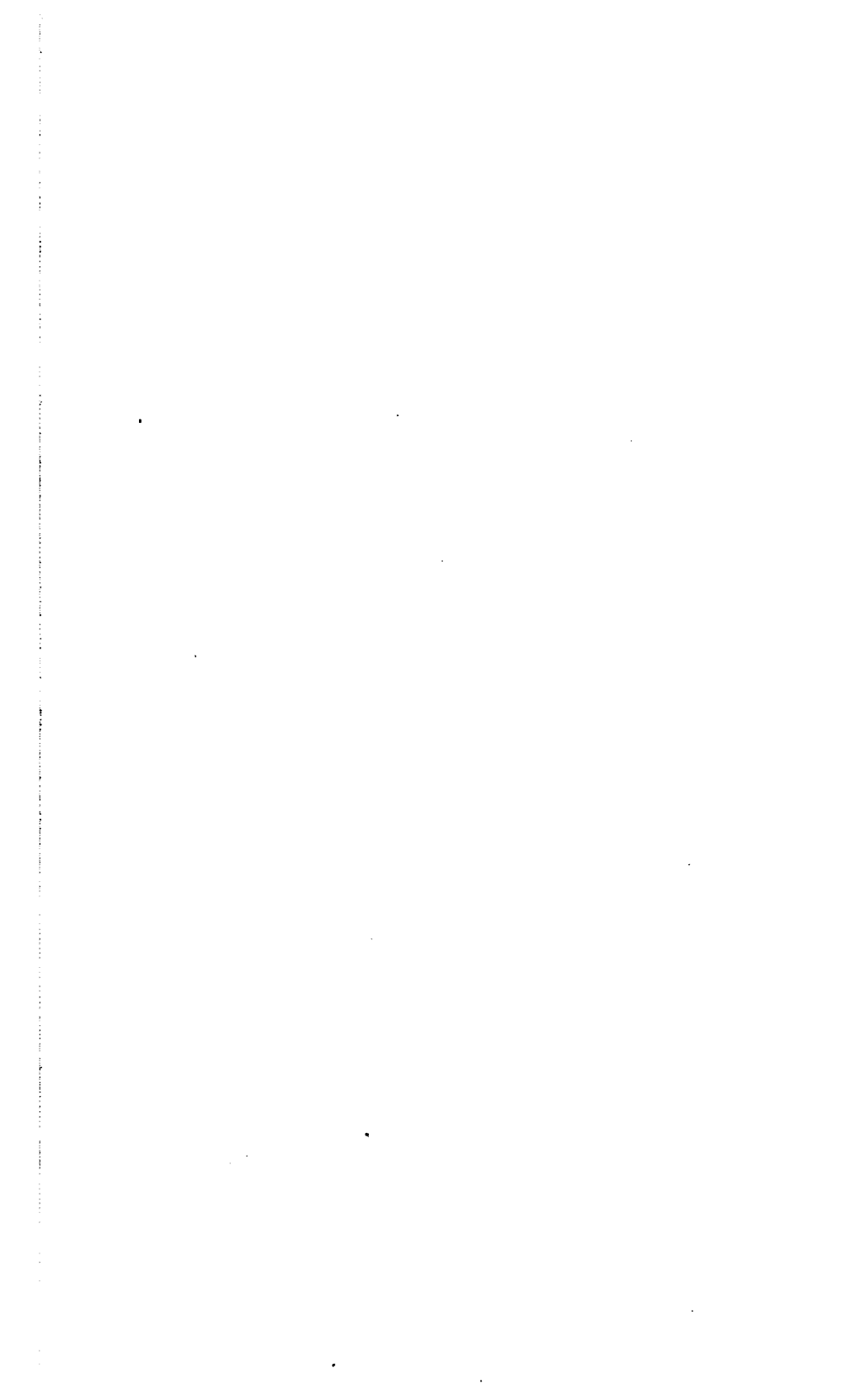
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LEGISLATIVE METHODS
AND FORMS

SIR COURTENAY ILBERT

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LEGISLATIVE METHODS AND FORMS

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PREFACE

THE contents of this volume are based on memoranda and other papers written at various times on subjects connected with my official work. Such value as they may possess arises from their representing more than thirty years' experience in the preparation of legislative measures both in England and in India. I have endeavoured to avoid subjects which have been already treated of by other writers, and to confine myself to matters about which I can speak from personal knowledge, and therefore with some degree of confidence and authority.

In dealing with my subject-matter, I have, of course, considered myself bound by rules of official reticence, but, notwithstanding the restrictions thus imposed, I cannot help thinking that the book may be useful and interesting both to the practical legislator and to the student of political institutions. Chapters I and X might even detain the eye of the general reader.

Chapter I is an attempt to trace, in broad historical outline, the relations between the common or customary law of this country and its enacted or statute law, and to compare them with the relations existing between customary law and statute law in France and Germany.

Chapter II describes the contents of the English Statute Book.

The greater part of these two chapters has appeared as articles in the *Journal of the Society of Comparative Legislation*.

Chapter III deals with what I have called subordinate

legislation, that is to say, that part of the law which is enacted, not directly by the supreme legislature, but under delegated powers—an important region, which has as yet been imperfectly explored. I have compared English tradition and practice in the delegation of legislative powers with the tradition and practice of continental countries.

Chapter IV is a retrospective summary of the attempts which, during the last three centuries and a half, have been made to improve the form of the English statute law. A study of these attempts and of their results may exercise a sobering, but perhaps also an educative, influence on the reformer. This chapter is based on a minute which I wrote in 1892, and which was published as a Parliamentary Paper in 1893.

Chapter V describes the mode in which Government legislative measures are prepared in England.

Chapter VI is a very short account of those matters relating to the passage of a public Bill through Parliament which have to be borne in mind by a Parliamentary draftsman and those for whom he acts.

Chapter VII is substantially a plea for prosecuting, in a more vigorous and systematic manner than heretofore, the unattractive but useful work of rearranging and consolidating the contents of the English Statute Book. It reproduces with some modifications an article which appeared in the *Quarterly Review*.

Chapter VIII deals with the well-worn subject of codification, restates briefly the familiar arguments for and against that process, and describes what has been actually done towards codifying the laws of different countries, and the mode in which, and the circumstances under which, the work has been done. I have thought myself justified in dealing at some length with Anglo-Indian codification, because its history does not seem to be generally known, and the facts relating to it are not easily accessible in a collected form. For valuable assistance in describing the

course of continental codification, I am much indebted to Dr. E. Schuster, of Lincoln's Inn. Portions of this chapter have already appeared in the *Encyclopædia of English Law* and in the *Law Quarterly Review*.

Chapter IX summarizes what I have been able to find out about the methods of legislation in the various British colonies, and is based on the extremely interesting replies which have been received to the queries addressed to the colonies by the Colonial Office at the instance of the Society of Comparative Legislation, and which have been published in the Journal of that Society.

Chapter X is to some extent a generalization from the contents of preceding chapters, and endeavours to describe and explain some of the most characteristic features of English parliamentary legislation.

Chapter XI, if it wished to be ambitious, might describe itself as a short treatise on nomography, but really consists of practical notes which I have made from time to time for the guidance of myself and of those who have worked with or under me in the preparation of legislative measures.

Chapter XII is also of a severely practical character, and consists of forms which may have to be used by a parliamentary draftsman, and of notes explaining some features of that complex and elaborate administrative system in which he is apt to find so many pitfalls.

The memoranda on which these two chapters are based have for some time been in private circulation, and copies of them were, a few years ago, sent by the Colonial Office to the Governments of the several British Colonies for the assistance of their official draftsmen.

It is impossible for me to acknowledge in detail my indebtedness to numerous friends. Chapters XI and XII were originally prepared as a supplement to the useful little treatise on 'Practical Legislation,' which was written many years ago by Lord Thring, my early instructor in the art of draftsmanship, but which has long been out of print. I am

reminded at every page of what I owe to my old and dear friend, the late Sir Henry Jenkyns, with whom it was my privilege to work officially for twelve years, and unofficially for a much longer period, and whose intimate acquaintance with the principles and details of English legislation and administration has never been surpassed.

I have been permitted to see in proof some of the chapters of Mr. Bryce's forthcoming *Studies in History and Jurisprudence*. He has dealt with some of the subjects on which I have touched, but from a different point of view, and with an abundance of knowledge and a felicity of expression and illustration which I can only envy and cannot emulate.

I am indebted to Mr. F. W. Gardiner for the Index and Tables of Statutes and Cases.

C. P. ILBERT.

3, WHITEHALL GARDENS.
February, 1901.

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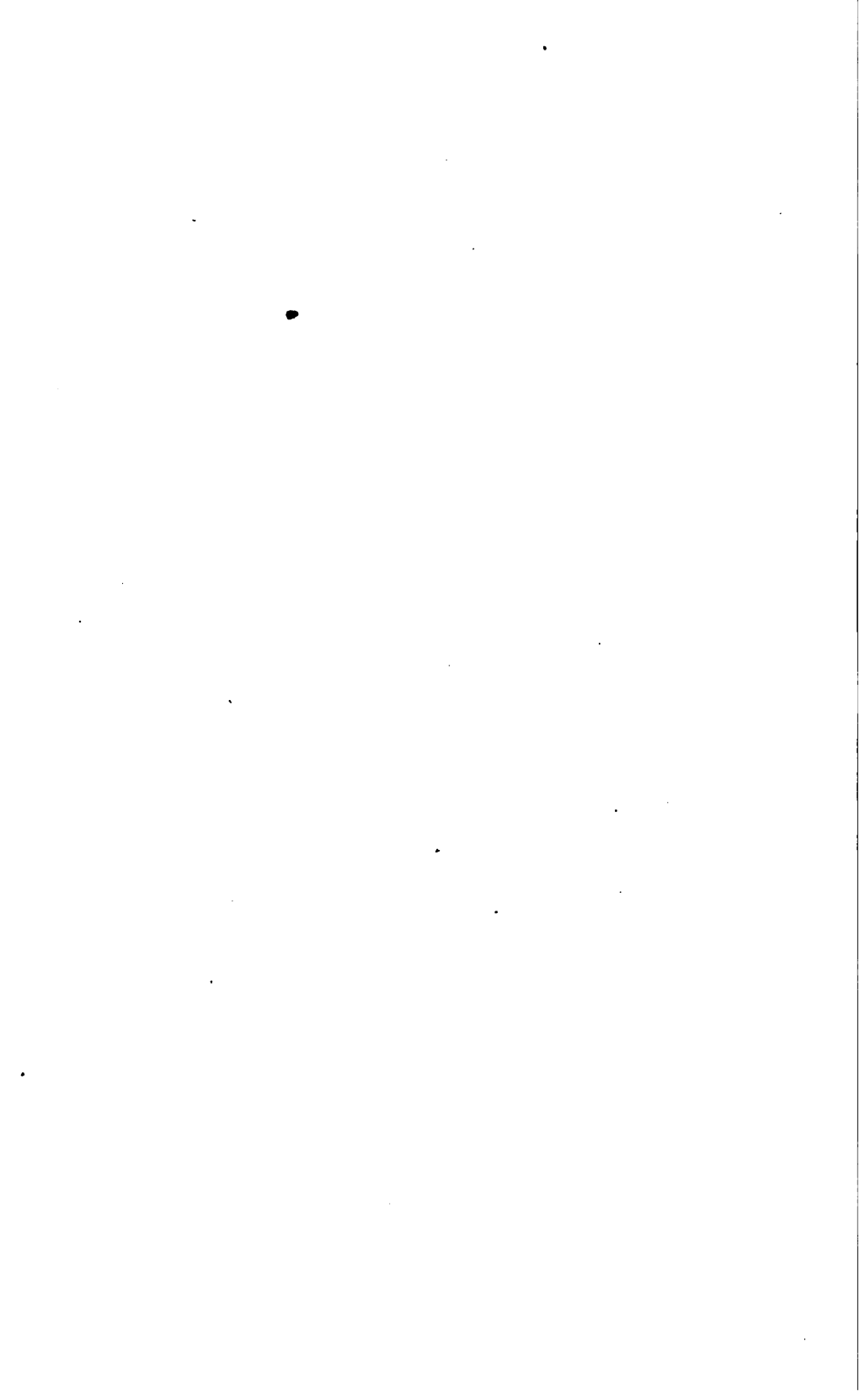
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LEGISLATIVE METHODS AND FORMS

CHAPTER I

COMMON LAW AND STATUTE LAW

THE modern English lawyer is apt to regard common law and statute law as hereditary foes. 'My Lady Common Law,' he would be inclined to say, 'regards with jealousy the rival who arrests and distorts her development, who plants ugly and inartistic patches on her vesture, who trespasses gradually and irresistibly on her domain.' But the historian knows that the antagonism between these two branches or forms of the law is not so absolute as is thus suggested, that they are necessary complements of each other, that their relations are those of co-operation rather than of opposition, and that this co-operation has probably been nowhere so complete as in our own country.

CH. I.
Rivalry
between
Common
Law and
Statute
Law.

The common law of a nation is part of the national life. It is one aspect of the national life, of which other aspects are language and religion. It is based on custom, on the custom of such groups as the family, the tribe, the manor, or the borough. As the groups coalesce the disparate customs become uniform. They are assimilated to each other by the contact of different groups, by the exigencies of commercial intercourse, by the influence of judicial decisions, and finally by the direct action of the legislature.

The
growth
of the
Common
Law.

These customs are observed in primitive times because they

CH. I. exist, without asking why or wherefore. It is safer to stand on the ancient ways. As man has acted in the past so he should act in the future. It is enough to know that if he does not, evils, supernatural and social, of an indefinite, and therefore of an alarming, character will probably await him.

Should a question arise as to what action ought to be taken in a particular case, the knowledge is to be sought from an elder, from a chief, from a priest, or from a member of some other privileged class. It is he who can pronounce the doom or unravel the mysteries of procedure. He is, in the language of early Iceland, the 'sayer of the law.' The notion of enacted law, of law as a command, laid down by a secular 'sovereign,' and backed by physical force, is of later date. The early lawgiver 'found' or 'declared,' rather than made, the law. He brought it down from Sinai. He reduced to writing, and revealed to the lay and profane public, what had previously been matter of esoteric knowledge.

Characteristics of English Law.

Among the causes which have produced the characteristic features of English law, as compared with the law of France or Germany, three are prominent—the continuity of legislation, the representative character of the legislative body, the strength of the central government.

Its continuity and uniformity.

The English parliamentary mill has steadily and unceasingly ground out Acts of Parliament for more than six hundred years—a period of continuous and unbroken legislation to which no European country can show any parallel. During the whole of this period the legislature has, through its constitution, been kept in touch with the feelings, wishes, prejudices, needs, of the people at large. Our law has been made for us, not by a monarch's edicts, not by an official or a privileged class, but by elected representatives of the people. The most despotic of our kings—perhaps these more than others—have always given a popular character to their laws. Henry VIII may have said in his heart, 'Regia voluntas suprema lex,' but he took care not to say it aloud. He called the tune, but he did not offer to play a solo. The

most arbitrary of his enactments were made by the authority of Lords and Commons, in Parliament assembled. And the law thus made has had effect throughout the realm. The strong hands of the first William and the second Henry welded England into a State, compact and centralized to an extent not reached in any other European country before the present century. The king's writ ran throughout the whole of the land. The king's judges visited all the chief towns. Liberties, franchises, and immunities there doubtless were, but the extent to which they derogated from the central authority was as nothing compared with the rights and powers of lords and cities on the Continent. Any important case could be brought up into the king's court. Thus the uniform and regular law administered by the royal courts gradually advanced upon and superseded the diversities and irregularities of local customs, leaving only a few manorial and burghal customs here and there as traces of the rank luxuriance of the earlier jungle. The process was, however, one of recognizing, cultivating, and developing, rather than of killing or driving out, local usages; and the body of law so formed is thoroughly national in its character, and has proved to be eminently capable of growth and expansion.

It is national in two senses: that of being home-grown and home-made, and that of being in its application general and not confined to particular localities, classes of persons, or groups of transactions. The grammar and groundwork of English law, as of the English language, have always remained English, although the law has freely absorbed and assimilated foreign elements. And the strength, compactness, and unity of the State have impressed uniformity on, and given generality of application to, the law. Where there are already several bodies of law struggling with each other for existence, the recognition of another does not present the appearance of an anomaly, or materially increase the inconveniences of the existing state of things. But where a single national body of law holds the field the case is different.

National,
in what
senses.

CH. I.

The law merchant, as developed by Lord Mansfield, with his special juries, has become part and parcel of the common law, and has not remained a thing apart. The canon law may be binding on clergymen by virtue of their ordination promises, but it does not, as such, bind the lay-folk; whilst the law of the land binds clergy and laity alike. There is no administrative law, and there are no special administrative courts, for the exclusive use of Government officials. The legality of their proceedings is tested by the ordinary law and courts of the land. Even the privilege of peers has become a matter more of antiquarian curiosity than of practical importance.

Early
Statute
Law.

The early chapters of the English Statute Book present some features of archaic legislation. They often declare rather than enact. They combine general enactments or declarations with particular decisions. 'The great virtue,' as has been well said by Mr. Jenks¹, 'of the English parliamentary scheme was that it enabled the exponents of all the customs of the nation to meet together and explain their grievances. If we glance at the roll of the English Parliament we shall find that the great bulk of the petitions which are presented during the first two hundred years of its existence are complaints of the breach of old customs, or requests for the confirmation of new customs, which evil-disposed persons will not observe. These petitions, we know, were the basis of the parliamentary legislation of the period. What is this but that Parliament was a law-declaring rather than a law-making body?' Of the combination of general with special remedies the Statute of Waste (20 Edward I) supplies a good illustration. It begins with a long story showing how Gawin Butler, having impleaded Walter de Hopton of waste made by him in certain lands, of which Gawin was tenant for life, died before obtaining judgement; how his brother and heir, William, who was under age and a ward of the king, impleaded Walter for the same waste; how

¹ *Law and Politics*, p. 63.

Walter came before Gilbert Thornton and his companions assigned to hear the king's pleas, and said that he ought not to answer William for waste made in the time of another; and how the justices differed in opinion. Thereupon the king, in his full Parliament, by his common council (*de communi consilio*)¹ proceeds to ordain that all heirs may have an action by writ of waste done in the time of their ancestors, and the king himself commands Gilbert Thornton and his companions to proceed and give judgement accordingly. The king is acting partly in his legislative capacity, partly in his judicial capacity, as having power to review and control the proceedings of the justices assigned to hear the pleas, and partly as guardian of an infant heir.

Bentham has accustomed us to draw a broad distinction between statute law and judge-made law. But in a case like that of William Butler the two forms of law obviously tend to slide into each other. And both forms of law were at that time practically made by the same persons. The king listened to the petitions which were presented to him in Parliament—petitions not unlike in their general character to the *cahiers* of grievances which, as revivals of ancient forms, preceded the French Revolution—and then, having considered the matter, with the help of his sages in the law, either did nothing or, through their agency, devised an appropriate remedy which might or might not correspond to the petition. It was not until the comparative decline of royal power under the Lancastrian dynasty that Parliament asserted its right of dictating the terms on which the laws for which it asked should be made, and marked the change in the character of legislation by making a significant addition to the legislative formula. Henceforth laws are expressed to be made, not

Petitions
to the
King in
Parliament.

¹ 'It is important to remember that in the Middle Ages no distinction was or could be drawn between "council" and "counsel"; both are *consilium*' (Maitland, 'Introduction' to *Memoranda de Parlamento*, p. lxvii). Professor Maitland's 'Introduction' to this volume of the Rolls' Series, which relates to the Parliament of 1305, contains the best description of the proceedings in an early English parliament.

CH. I. merely with the advice and consent, but *by the authority*, of Parliament.

Diver-
gence of
parlia-
mentary
and
judicial
law-
making.

As the legislative and judicial authorities became distinct from each other, so statute law and common law tended to flow in separate channels. The legislation of the first Edward, moulded by his judges, is largely concerned with private rights and the corresponding remedies, and settled the main lines on which English law, both public and private, was to proceed. But though Parliament never renounced or placed limits to its omnipotence, yet the later volumes of the Statute Book are far more concerned with public or administrative than with private law. Nine-tenths of each annual volume of statutes¹ are concerned with what may be called administrative law; and an analysis of the contents of the general Acts during the last four centuries would probably show a somewhat similar proportion. On the other hand, at least nine-tenths of the leading rules which make up the law of contract and tort are common law, and their origin and development are to be found in the pages of the Year Books and the Law Reports, and not of the Statute Book.

But the intervention of the legislature in the domain of private law, though sparing and unsystematic, has been continuous. When the development of common law rules has failed to keep pace with changes in social and economical conditions, when a too servile adherence to precedents has forced those rules into a wrong groove, the legislature has never shrunk from stepping in and bringing the rules into conformity with the national will and national requirements. And the supremacy of Parliament has been unquestioned. The highest courts of justice in England have never claimed, like the *parlements* in France, the right to register, and for that purpose to review, the enactments of the legislature. There has been a natural tendency on the part of the judges to place a narrow construction on enactments which appeared

¹ i. e. of the public general Acts.

to them to conflict with what they have regarded as fundamental principles of common law, to round off their angles, to adapt them to their environment by means of ingenious and sometimes far-fetched glosses; and the process has occasionally been carried to such an unwarrantable extent as to justify the expression of driving a coach and four through Acts of Parliament. But the action of the courts is to be judged in the light, not of a few petulant or captious criticisms by individual judges, but of their general course of conduct; and they have as a rule loyally adhered to their function of being, not critics of the legislature, but interpreters of the law.

CH. I.

If the most prominent feature of English legislation has been its continuity, the most prominent feature of English judge-made law has been the binding force of precedent. The authority of precedent. This feature is a direct consequence of the centralized character given to English constitutions by strong Norman and Angevin kings. The authority of the king, through his courts at Westminster, has for centuries been asserted effectively over all other courts in the kingdom. There has been nothing in England answering to the twelve provincial *parlements* of France, each claiming co-ordinate jurisdiction with the *parlement* of Paris, each having its own *jurisprudence*. If there is a question what the common law is, the practice and usage of Westminster has supplied the test. Under such a centralized and hierarchical system it is easier to assess the comparative weights of judicial precedents, and to recognize and strengthen their authority, than in a country with many judicial centres. The effect has been to enrich the substance of English law at the expense of its form. There is no body of law with so great a wealth of judicial precedents, drawn, not from imaginary cases, but from the facts of actual life, none in which there is so good a chance of finding a rule precisely fitting the case for which guidance is wanted. One feels as one studies it that it is the product, not of schoolmen or professors, but of hard-headed business men grappling with

CH. I. tough problems of actual life. On the other hand, this very wealth of precedent, and the concrete form in which legal rules are presented, is apt to exercise a cramping influence on the legal mind. The knowledge that industrious search will probably unearth in time a case precisely in point produces a disinclination to rely on, or to recognize the importance of, principle. A legal textbook is apt to be an exhaustive but uncritical collection of decided cases. The advocate or the judge, when embarking on the sea of legal argument, is apt to grope his way round from headland to headland, instead of steering across by compass. Rules painfully built up by the competition of conflicting analogies, though more certain in their application, are less easy to express than rules deduced from general principles. Hence, though the leading principles of English law are easy and clear to the trained lawyer, the knowledge of law is more of an esoteric science in England than in the countries of written codes.

A com-
parison
with
France.

Useful light may be thrown on the characteristic features of English law by a glance at the main stages in the development of law in such a country as France. The France of the old *régime* never developed a representative legislature, never established a Supreme Court for the whole country, never achieved unity of law. The States General came into existence at about the same time as the English Parliament, a time at which representative institutions were breaking out all over Europe. But their development was arrested. Their activity was intermittent; their representation of the country was incomplete; they never became a true legislature. They did not sit continuously. They were only called together on occasions of emergency. For more than a century and a half (1614—1789) they were never summoned at all. They only represented the royal bailiwicks. In the States General of the fourteenth century Burgundy, Provence, and Brittany do not figure. In their functions with respect to legislation they stopped short at the earliest stage of the English

Parliament. The king wanted money; the people had grievances. They met and struck a bargain, in pursuance of which certain grievances were redressed and certain financial aids were granted. But if legislation was required, it was the king who made the law. The elected members of the States General were shackled by a *mandat impératif*; they were limited agents, having no powers beyond those specifically entrusted to them by their constituents. Thus they could not shape the laws for which they asked. The power of making laws remained with the Crown, and was exercised by means of Ordinances (*Ordonnances*), which were drawn up by the king's chancellor. As the king's will was not directly associated with or supported by the national will, the power of legislation was less freely exercised, and the laws made carried with them less authority, than in a country with a representative legislature. Nevertheless, the general Ordinances of the fourteenth to the seventeenth centuries were numerous, and some of them were of great importance¹. They were usually, but not always, made after sittings of the States General, and with reference to the *doléances* and *cahiers* presented at those sittings. The series begins with the Ordinance of Philip 'le Long' in 1318. Other Ordinances followed in the troublous times of John and Charles VI. The great Ordinance of Montil les Tours, in the reign of Charles VII, embodied the programme of reforms which the Crown desired to effect at the close of the Hundred Years' War. The fifteenth century closed with two great Ordinances, based on the grievances presented by the States General of 1484, the Ordinance of July, 1493, and that of March, 1498 (Ordinance of Blois). The reign of Francis I was marked by the great Ordinance of Villers-Cotterets (1539). Then came the Ordinances which are associated with the name of the Chancellor L'Hôpital, and of which the three most important, Orleans (1560), Roussillon (1563), and Moulins (1566), arose out of the sittings of

¹ See Esmein, *Cours Élémentaire d'Histoire du Droit Français*, pp. 780, &c.

CH. I. the States General at Orleans in 1560. The States General of 1576 led up to a new Ordinance of Blois in 1579. The series was closed by the Ordinance of 1629, drawn up by the Chancellor Michel de Marillac, and based on the grievances presented by the States General of 1614 and on the suggestions made by the subsequent assemblies of 'notables.' These Ordinances dealt, among other things, with such subjects as the celebration of marriages (1579, 1629), the registration of births, deaths, and marriages (1539, 1579, 1629), the law of evidence (1566), the registration of gifts (1539, 1566), and the limitation of entails (*substitutions fidéi-commissaires*) (1560, 1566). But their most important work was in connexion with the procedure of the courts. They fixed the essential lines of civil and criminal procedure, and completely transformed the character of criminal procedure, substituting for the accusatory, oral, formal, and public procedure of the feudal courts the inquisitorial, written, informal, and secret procedure of the Roman and canon law. This change was principally effected by the Ordinances of 1498 and 1539.

Ordi-
nances of
Louis XIV
and
Louis XV.

The Ordinances of Louis XIV and Louis XV are of a different character from those just described. The Ordinances of the fourteenth to the seventeenth centuries answer to our amending Acts. The Ordinances of Louis XIV and Louis XV are codes. They were framed by learned commissions. They presented in a complete, systematic, and detailed form the whole of a particular branch of the law. They extended to the whole of the country. They were the immediate predecessors of the existing French codes, and to a great extent they suggested the form and supplied the material of these codes.

Colbert
and
D'Agues-
seau.

The Ordinances of Louis XIV and of Louis XV are associated with the names of a great financier and a great lawyer. The former were due to the suggestion of Colbert; the latter were framed under the direction of the Chancellor D'Aguesseau. The most important of Colbert's Ordinances

were four in number: (1) that of 1667, containing a code of civil procedure; (2) that of 1670, regulating criminal procedure; (3) the *Ordonnance du Commerce* of 1673, supplemented by the *Ordonnance de la Marine* of 1681, and forming together a code of commerce for land and sea; (4) the Ordinance of 1669, constituting a code of forest law. The Chancellor D'Aguesseau aimed at nothing short of a complete code of French law, but was unable to produce more than four fragments of the gigantic work which he had contemplated. These were: (1) the Ordinance of 1731 on gifts; (2) that of 1735 on wills; (3) that of 1747 on family settlements (*substitutions fidéi-commissaires*); (4) that of 1737 on forgery¹. The first three of these Ordinances have been to a great extent embodied in the *Code Civil*; the fourth has passed almost in its entirety into the existing codes of civil and criminal procedure. The *Code du Commerce* practically consists of Colbert's *Ordonnances du Commerce* and *de la Marine*, and this accounts for that code being to a great extent out of date and unsuited to modern commercial requirements.

CH. I.

It has been said above that the French Ordinances, being based merely on the royal prerogative, did not carry with them the same kind of authority as Acts of the English Parliament. They required, as a condition of their validity, registration by the judicial bodies called *parlements*. This registration was probably intended to be merely a mode of promulgation; but the *parlement* claimed, as incidental to it, the right of criticism and a discretionary power to refuse registration. And in the absence of any popular control over legislation, these claims obtained a certain amount of popular support.

Registration of Ordinances by 'Parlement.'

If the *parlement* persistently refused to register, the proper move in the constitutional game was that the king should hold a 'bed of justice.' This meant that, by appearing in

A 'Bed of Justice.'

¹ The subject dealt with by the Ordinance was rather more comprehensive. The title was *Concernant le faux principal et le faux incident et la reconnaissance des écritures et signatures en matière criminelle*.

CH. I.

person in his court, he superseded the action of his deputies, and took upon himself the personal responsibility of requiring registration. But even then the courts had large powers of nullifying an Ordinance by evading its provisions or even declining to give them effect. Michel de Marillac's Ordinance of 1629, which, though embodying useful reforms, did not meet with judicial approval, and was contemptuously christened the Code Michaud, was nullified in this manner. Under the strong rule of Louis XIV the powers of the *parlement* with respect to registration were taken away by a royal declaration. But they were revived in the Regency, and during that time and after the majority of Louis XV gave rise to frequent conflicts. A famous refusal to register in 1770 led to Maupeou's *coup d'état*. The recalcitrant magistrates were deposed and exiled, and the *parlement* of Paris was suppressed. It was revived by Louis XVI, asserted its rights by vetoing Turgot's reforms in 1776, and had to be overridden by the holding of a 'bed of justice.' Further conflicts followed. The last 'bed of justice' was held in 1788, and was followed by the summoning of the General Assembly, which ushered in the Revolution and swept away the old *régime*.

The 'Parlement' of Paris.

The *parlement* of Paris was developed out of the king's council in much the same way as the royal courts at Westminster. But it differed from them in two respects. On the one hand it continued, as we have seen, to claim a share of legislative authority for centuries after a definite line of distinction had been drawn between legislative and judicial functions in England. On the other hand, its judicial authority did not extend to the whole kingdom. It did not succeed in establishing supremacy over the provinces which the Capetian kings gradually added to their original royal domains. The seignorial jurisdictions of these provinces gradually crystallized into twelve provincial *parlements*¹.

¹ Toulouse, Grenoble, Bordeaux, Dijon, Rouen, Aix, Bretagne, Pau, Metz, Besançon, Douai, Nancy.

Each of these *parlements* was sovereign in its own sphere and independent of the *parlement* of Paris; and each developed a *jurisprudence* of its own. Thus the chief factor which made for unity of law in England, the all-pervading influence of the courts at Westminster, was absent in France.

CH. I.
—

The personal laws of the several Teutonic tribes had become territorial customs, which remained separate, although they fell into two main groups, corresponding with the regions which became known as the *pays de coutumes* and the *pays de droit écrit*, and were bounded approximately by the line separating the northern dialects of the *langue d'oïl* from the southern dialects of the *langue d'oc*¹. In the *pays de droit écrit*, which had been more completely and permanently Romanized, Roman law continued to be the common law, and in the course of the last three centuries of the old *régime* overwhelmed and destroyed the local customs which had grown up in particular places. The only branch of law which it did not succeed in displacing was the feudal law of rights relating to land. In the *pays de coutumes*, where Teutonic influences were stronger, the common law was custom. But it was a common law with great gaps, which had to be supplied from Roman law. Thus the law of contract was practically Roman. And under the influence of the jurists the principles of Roman law leavened the whole lump. The difficulty of ascertaining the customary law, and the practical inconvenience which ensued, led to a general demand for an authoritative version. The French kings of the fifteenth and sixteenth centuries, particularly Charles VIII and Louis XII, made vigorous and systematic efforts to meet this demand. The course ordinarily adopted was this. The principal royal judge of the province was instructed to prepare a preliminary draft, with the aid of his subordinate judges and magistrates. Commissioners—two, three, or four in number—were then appointed, and proceeded to hold what we should now call a local inquiry, at which representatives

Cus-
tomary
Law in
France.¹ Esmein, p. 718.

CH. I. of the three 'estates'—clergy, nobility, and commons—were present, and at which the articles of the draft were fully discussed. Articles on which there was a general agreement were at once promulgated by the commissioners in the name of the king. Points of difficulty were reserved for decision by the local *parlement*, and the full text, when finally settled, was formally registered by the *parlement*. In this way the customs of all the provinces had, by the end of the sixteenth century, been reduced to a written and authoritative form.

Reconciliation
of conflicting
customs.

The great work of digesting and promulgating local customs exercised an important influence on the subsequent development of French law. In the first place, the methodical comparison of conflicting customs, the attempt to discover the common principles which underlay them, the systematic grouping and arrangement of the customs when found, supplied an intellectual gymnastic of the most valuable kind, and trained up generations of lawyers and jurists who were imbued with the principles required for successful codification. In the next place the customs thus formulated, though purporting to be, and being substantially, a reproduction and declaration of existing customs, yet were promulgated by, and to some extent derived their binding force from, the royal authority, and thus prepared the national mind for the exercise of a systematic control by the supreme legislative authority over the domain of private law¹. Thus the commissions of the sixteenth century paved the way for the partial codification of the eighteenth and the complete codification of the nineteenth century. When the Convention and the first Napoleon took up their task of codification they

¹ The so-called *Établissements de Saint Louis* supply a curious illustration of the way in which royal authority was sometimes erroneously attached to a compilation of local customs. They were long believed to have been enacted by Louis IX, but they are now recognized as being the work of a private compiler, who wrote a little before 1272. Their contents are taken partly from a *règlement* made for the provostry of Paris, partly from a custumal of Anjou and Maine, partly from an ancient custumal of Orleans (*L'Usage d'Orléans*). See Viollet, *Établissements de Saint Louis*.

found the ground prepared, the general lines of the edifice laid down, some portions of the building completed, and, above all, architects trained by generations of experience. Curiously enough, the only chapter of the new codes which had not come into even partial existence was the law of crimes. For the Penal Code there was no French precedent.

Of the causes which made for codification in France at the beginning of this century, the most important were probably three. In the first place, a strong sense of the practical evils which arose from diversity of laws, coupled with a passionate desire for national unity. In the next place, the continuous efforts of many successive generations of statesmen and lawyers, all tending in the same direction, all aiming, consciously or unconsciously, at the same ideal. And lastly, the fact that the common law of part of the country was wholly, that of the other part largely, based on law which had already been systematized. The textbook of the obscure but immortal law-coach Gaius has supplied the ground plan for all modern European codes.

The impulse to codification in France.

In Germany, the history of law takes a different course¹. The political development of mediaeval Germany was blighted by the shadow of the Roman Empire, and thwarted by the rivalry of the Pope. Germany had never had a common law. Each of the nations who were brought under the Frankish Empire had a law of its own, which was partially reduced to writing in the *Leges Barbarorum*. There was a Salic law, a law of the Ribuarians, a law of the Alamanni, a law of the Bavarians, a law of the Frisians, a law of the Saxons, and a law 'of the Angles and Werings, that is to say, of the Thuringians.' A strong central legislature or a strong central judicature might have welded the

Development of law in Germany.

¹ See Brunner's essay on the Historical Foundations of German Law in Holtzendorff's *Encyclopädie der Rechtswissenschaft*; Siegel, *Deutsche Rechtsgeschichte*, 3rd ed., Berlin, 1895; the chapter on 'Legislation in Germany' in Mr. Herbert Fisher's *Mediaeval Empire*; and an interesting article by Dr. Schuster on 'The German Civil Code' in the *Law Quarterly Review* for January, 1896.

См. I. materials at its disposal into a common law for the Empire. But neither of these existed in mediaeval Germany. The earliest 'Land-peaces' which supplied imperfect substitutes for criminal law, were treaties rather than laws. The 'Land-peaces' of Frederick Barbarossa, and Frederick II's Peace of Mainz (1235) were real laws, but they never obtained general assent or observance. When the *Weistümer*, the cases decided in the more important courts, came to be recorded, there was no central court into which they could be withdrawn, or which could mould them into unity. The disintegrating influences of particularism prevailed, and Germany fell to pieces, legally as well as politically. By the side of, and stronger than, the weak Imperial law, there were laws for particular territories, places, and classes. There were territorial laws and town laws; there were also manorial laws and ministerial laws, each with their separate courts. Eike von Repkow's *Sachsenspiegel*, or Mirror of Saxon Law (1230), attained great popularity in the fourteenth century, and, under a misconception like that applied to the *Établissements de St. Louis*, was attributed to Imperial authority. Under happier auspices, this attempt to unify Saxon law might have formed the basis of an attempt to unify German law on national lines. But its seed fell on barren ground. Beside the waning influence of the German law was the waxing influence of the Roman law. The introduction of Roman law into Germany was not the arbitrary act of any sovereign, but was one of the effects of the revival of classical learning. It was, however, materially aided by two causes. One was the political union of Germany and Northern Italy, which sent German students to the Italian universities, and brought them back imbued with the principles of Roman law. The other was the feeling that the German Emperor was the successor of the Roman Caesars, and that the fundamental law of his empire ought to be the law of Rome.

The 'reception' of Roman law as the common law of Germany is generally dated from the constitution of the

Imperial Chamber Court (*Reichskammergericht*) in 1495. This court was to be composed of judges, of whom at least one-half were to be learned lawyers, i. e. lawyers learned in Roman law. The court was to adjudge 'according to the laws of the empire and the common law,' but with due regard to the customs and statutes of the territories; and the law of the empire and the common law was to consist of—

1. Roman law as it was to be found in Justinian's compilations;

2. Canon law as laid down in the *Corpus Iuris Canonici*; and

3. The Lombard *libri feudorum*.

Charles V emulated the legislation of his Hohenstauffen predecessors by promulgating his *Constitutio Criminalis Carolina* (1532), the well-known C. C. C., which has exercised a permanent influence on German criminal law. But this was the last expiring effort of Imperial legislation before German unity was finally shattered by the 'Thirty Years' War.

When the movement for codification reached Germany in the latter half of the eighteenth century, it was by the governments of the several German States that it was taken up. Frederick II led the way by preparing, with the help of his Chancellor Cocceji and others, the draft of a general Prussian code, which became law in 1794, under the title of *Allgemeines Landrecht für die Preussischen Staaten*, and was followed by a Procedure Code in 1795. Austria had made some attempts to codify the law of crimes and procedure under Maria Theresa and Joseph II, and passed a partial Criminal Code in 1803 and a Civil Code in 1811. The tide of Napoleonic invasion brought the French codes into the Rhenish provinces, where they obtained a permanent footing. Thibaut (1814) preached to Germans the duty of codifying their law on French lines, but Savigny, in his powerful counterblast, pointed out (and exaggerated) the imperfections of the French codes, and told his countrymen bluntly that

CH. I.

they had not yet acquired either the knowledge of legal principles, or the experience, or the terminology, requisite for successful codification¹. German codification slumbered until 1848, when it was awakened by the revival of the desire for national unity. A general law of bills of exchange (*Wechselordnung*) was discussed by representatives of all the German States, and promulgated as a law of the short-lived empire which followed the events of 1848. It was either confirmed or introduced as a separate State law by most of the German States between 1848 and 1850. In a similar way, the German Commercial Code was passed as a State law by most of the individual States, including Austria, between 1862 and 1866. During the same period Saxony codified its own law. The events of 1866 and of 1870 gave a powerful impulse to German codification. In 1871, the Bills of Exchange Code and the Commercial Code were re-enacted as Imperial laws. A Criminal Code which in 1870 had been passed for the North German Confederation also became a law of the Empire. Codes of Civil and Criminal Procedure, a code organizing the Courts throughout Germany on a uniform system, and establishing a Supreme Court of Appeal at Leipzig, and the Bankruptcy Code, came into force in 1879. Among the matters also dealt with by Imperial legislation were the laws relating to marriage and registration, to copyright, and to patents and trade marks. But as to matters not regulated by Imperial legislation, the local law is still applicable. 'Speaking broadly,' wrote Dr. Schuster in 1896, 'it may be stated that out of a population of 42½ millions, 18 millions are governed by the Prussian code, 14 millions by the German common law, which remains the modernized law of Justinian, 7½ millions by French law, 2½ millions by Saxon law, and half a million by Scandinavian law. There are therefore six general systems of law, but only two out of these, the system of the French and that of the Saxon code, are exclusive systems; the other systems are broken into by

¹ See below, p. 123.

local laws and customs. . . . The result is that in every case CH. I.
which arises in Germany, the following questions must be
asked: Is there any Imperial statute? Is there any local
modern statute? Is the subject affected by older legisla-
tion? What local law governs it?'

It was the confusion and the practical difficulties arising from this multiplicity and diversity of laws that gave force to the demand for the general Civil Code, which has formed the coping-stone of German codification. The first Commission for preparing a draft Civil Code for the German Empire was appointed on July 2, 1874, and submitted its draft to the Imperial Chancellor towards the end of 1887. A second Commission was appointed in April, 1891, and completed its work in June, 1895. On the basis of this second draft, a third draft was prepared by the Federal Council and submitted to the Reichstag at the beginning of 1896, and after being discussed and amended was passed into law on August 18, 1896. The Code came into operation on January 1, 1900.

It will have been seen that the impulses to codification in Germany were substantially the same as in France, but that, owing to a variety of causes, those impulses produced their effects at a later date.

CHAPTER II

THE ENGLISH STATUTE BOOK

CH. II. WHAT is the English Statute Book? What are its contents? Where are they to be found? How are they arranged? What facilities are there for ascertaining the enactments which have been made on a given subject, and the extent to which they are in force? The object of this chapter is to supply an answer to these questions.

Meaning
of
'Statute.'

The word 'Statute' is in ordinary English usage treated as equivalent to Act of Parliament, and the English Statute Book might therefore be expected to include all Acts passed by the Parliament of England, or, since the union with Scotland and Ireland respectively, by the Parliament of the United Kingdom. But the Statute Book includes certain enactments which are not, in the strictest sense, Acts of Parliament, and excludes certain enactments which are. When Parliament was first taking shape as a legislative body, laws were made, not by the King, Lords, and Commons in Parliament assembled, but by the king, with the counsel and assent of the great men of the realm; and the legislation of the reign of Henry III, and most of that of Edward I, was the work of assemblies to which the Commons were not summoned. The line between Royal Ordinances and Acts of Parliament is not easy to draw in the first stages of Parliamentary legislation, and some of the most important among the early enactments in the English Statute Book, including the Statute 'Quia Emptores,' would not comply with the tests applied to a modern Act of Parliament. On

the other hand, the ordinary editions of the 'Statutes at Large'¹ exclude numerous Acts of Parliament as being either local or private. The line between general and local, public and private, Acts has been drawn variously at different times, and will be referred to hereafter. For the present, the Statute Book will be treated as including only the public general statutes.

CH. II.

The first edition of the English Statutes which was at once authoritative and collective was that commonly known as the *Statutes of the Realm*. The Parliament of 1800 (the Parliament which passed the Act of Union with Ireland) devoted much attention to the condition of the public records, and a Select Committee of the House of Commons presented a report on this subject on July 4, 1800. One of the conclusions arrived at in this report was that it was highly expedient for the honour of the nation and the benefit of all His Majesty's subjects that a complete and authoritative edition of all the statutes should be published. The report of the committee was followed by an address to the Crown, which led to the appointment of the first Record Commissioners. The Commissioners at their first sitting resolved, 'That a complete, and authentic collection of the Statutes of the realm be prepared, including every law, as well those repealed or expired as those now in force, with a chronological list of them, and tables of their principal matters.' This resolution led to the preparation of the edition entitled, *Statutes of the Realm, printed by command of His Majesty King George III, in pursuance of an address from the House of Commons of Great Britain, from original records and authentic manuscripts*. This edition is in nine folio volumes, of which the first was published in 1810, and the last in 1822, and contains the statutes from Henry III's Provisions of Merton (1235-6) to the last year of the reign of Queen Anne (1713). Prefixed to these statutes, in the first volume,

Statutes
of the
Realm.

¹ This phrase appears to occur first in one of the Elizabethan editions of the statutes, that by Barker.

CH. II. are prints of certain 'charters of liberties,' including Magna Charta, and an elaborate introduction, which, though superseded on some points by later researches, contains a large amount of interesting and valuable information on the history and condition of the English Statute Law. The introduction gives an account of the former printed collections, translations, and abridgements of the statutes, and describes the various plans which had been proposed for an authentic publication, or for a revision, of the statutes. Then, after a reference to the Charters, it describes the matters inserted in the collection of the statutes, their arrangement, the sources from which they were taken, and the methods adopted in searching for, transcribing, collating, noting, and printing the text of the statutes. The editors found much difficulty in determining what ought to be considered as statutes; and the conclusion at which they ultimately arrived was to include in their edition 'all such instruments as have been inserted in any general collection of statutes printed previously to the edition by Hawkins' (published 1735), 'with the addition only of such matters of a public nature, purporting to be statutes, as were first introduced by him or by subsequent editors, and of such other new matters of the like nature as could be taken from sources of authority not to be controverted—namely, Statute Rolls, Inrollments of Acts, Exemplifications, Transcripts by Writ, and original Acts.' Hence the first volume contains not only royal enactments which are not, strictly speaking, Acts of Parliament, but sundry documents, of which both the authenticity and the claim to be considered as enactments at all are open to much doubt¹. The Acts down to 1489, when the old practice of making up the Statute Roll ceased, are printed in double columns, one column containing the original Latin or Norman-French, the other the English translation, except

¹ See e.g. the remarks on the so-called Statute 'De Officio Coronatoris,' 4 Edw. I, in *Pollock and Maitland*, bk. II, chap. ix, par. 4; and Gross, *Introduction to Select Coroners' Rolls* (Selden Society), p. 25.

that for the session of 1488-9 (4 Hen. VII) both columns are in English, one printed from the Parliamentary Roll, the other from a different version contained in a book formerly kept in the Court of Exchequer at Westminster. The edition was supplemented by two index volumes. The first of these, which was published in 1824, and was called an alphabetical index, contains an alphabetical list of the subjects dealt with by the statutes comprised in the nine volumes, giving, in connexion with each subject, a short reference to the enactments dealing with it. The other, which was published in 1828, though called a chronological index, also proceeds on the basis of an alphabetical list of subjects, but gives under each subject-heading a list in chronological order of the enactments relating to it. It is really an expanded version of the alphabetical index.

CH. II.

In pursuance of a resolution passed by the Record Commission in 1807, a folio edition of the Scottish Statutes was prepared on lines resembling the English edition of the *Statutes of the Realm*. In order to give further time for consideration of the difficulties connected with the earlier statutes, it was arranged that the first volume should be postponed. Accordingly, vols. 2 to 11, containing the statutes from 1424 to 1707, the date of the union with England, were brought out in the years 1814 to 1824, whilst the first volume, containing documents of earlier date, did not appear until 1844.

Scottish
Statutes.

The Record Commission did not bring out any edition of the Irish statutes, but an edition of them in twenty folio volumes had been previously printed by the King's Printer-General in Ireland, in pursuance of an order made by Lord Halifax in 1762, when he was Lord-Lieutenant of Ireland.

Irish
Statutes.

For the period since the reign of Queen Anne no collective edition of the English Statutes, containing repealed as well as unrepealed matter, has been published by authority. Of the editions brought out by private enterprise in the eighteenth century, the most important were those by

Editions
of Statutes
at Large
for period
since 1713.

CH. II. Serjeant Hawkins (1734-5) and by Mr. Ruffhead (1762-4). These editions were regularly continued by subsequent volumes, and as they were printed from the King's Printers' copies of the statutes their contents for the period since 1707 may be relied on as accurate; but they omit Statutes which are treated as of minor or transitory importance. King's Printers' copies of the nineteenth-century statutes have been published in many forms, and an octavo edition of the Acts of each session is now published by the Stationery Office within a reasonable time after the end of the session.

Chitty's
*Statutes of
Practical
Utility.*

The edition most commonly used by practising lawyers is Chitty's *Statutes of Practical Utility*. In this edition all the statutes which the profession are considered likely to want are printed with short notes, and are grouped under subjects which are alphabetically arranged. The latest edition, by J. M. Lely, is in thirteen octavo volumes, and is brought down to the end of 1895. A supplemental volume is published every year.

Statutes
Revised
(first
edition).

The object of the Statute Law Revision Acts, which have been passed from 1861 onwards, has been to purge away dead matter from the Statute Book, and thus to facilitate the preparation of an edition of the statutes which should contain only such Acts as are in force. After three of these Acts had been passed, Lord Chancellor Cairns, in 1868, took active steps for the preparation of such an edition by the appointment of a Statute Law Committee to superintend the execution of the work. The result was the first revised edition of the statutes, the first volume of which appeared in 1870, and which was carried in a series of eighteen quarto volumes down to the end of 1878.

Statutes
Revised
(second
edition).

A second edition of the Revised Statutes was begun in 1886, and is carried, in sixteen octavo volumes, down to the end of that year. This edition is handier in form, and cheaper, than its predecessor¹, embodies the effect of later Revision Acts, and contains in each volume not only a chrono-

¹ The price of each volume is 7s. 6d.

logical list of the Acts passed in the period covered by the volume, showing how far they have been repealed, but also a full index to the enactments printed in the volume. CH. II.
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As the utility of these revised editions has been questioned, it may be worth while to illustrate by a few figures the amount of cost and labour which they save. The first edition of the Revised Statutes substituted eighteen volumes for one hundred and eighteen¹. The new edition contains, in five volumes, the enactments down to the beginning of the present reign, which occupied seventy-seven volumes of the statutes at large. There are, indeed, two classes of persons whose needs the revised edition will not fully meet, and, it may be added, was not specially designed to meet. The judge who has to decide, the counsel who has to advise, on the construction of an obscure enactment, frequently finds it necessary to refer to the language of Acts, sections, or words, which have been repealed, either as dead law, by Statute Law Revision Acts, or as superseded law, by amending or consolidating Acts. To the historical student the law of the past is even more important than the law of the present. Both these classes of persons require an edition of the statutes containing everything that has been repealed, either by way of statute law revision or otherwise. But both these classes may derive material assistance from the notes and tables in the revised edition, which show the reasons for each repeal or omission. And to the ordinary legislator, official, lawyer, or member of the public, it is surely an immense advantage to have an edition of the statutes which contains only living law, which is comprised within a reasonable compass, and which may be purchased for a reasonable price.

A revised edition of the Ante-Union Irish Statutes, from 1710 to 1800, comprised in a single quarto volume, corresponding in form to the first revised edition of the English Statutes, Irish
Statutes
Revised.

¹ 'After omission of repealed and expired statutes to a vast amount, the present price of the last edition of the statutes exceeds the average income of any individual of the labouring classes in England' (Bentham, *Works*, by Bowring, vol. iii. p. 239).

CH. II. was brought out under the authority of the Irish Government in 1888.

Projected
edition of
Scottish
Statutes
Revised.
Annual
Volumes
of Public
General
Statutes.

A revised edition of the Ante-Union Scottish Statutes is in course of preparation.

The year 1886 was selected as the termination of the period for the Revised Statutes, because the existing edition of the Annual Statutes begins with the following year. Down to the year 1887 the Annual Statutes were printed and published in different forms and at different prices. But, as from the beginning of 1887, one authoritative edition only of the statutes is published annually¹, in an octavo volume, at a cheaper price than formerly, and is edited by an officer paid by the Treasury. Each volume contains an index to the public general Acts of the session to which it relates, and five tables, namely :

1. A table of the titles of the public general Acts passed during the session, arranged in the order in which they were passed ;
2. A table of the titles of the public Acts of a local character passed during the session which are placed among the local Acts ;
3. A table of the titles of the local and private Acts passed during the session ;
4. A table showing the effect of the year's legislation on public general Acts ; and
5. A table of the local and private Acts arranged in classes.

Classifica-
tion of
Statutes.

The system of classification on which these tables are based dates from the year 1868². Under this system the Acts of each session are classified in three groups, each separately numbered :

1. Public General Acts.
2. Local Acts.
3. Private Acts.

¹ The price of each volume of the Annual Statutes in the edition published by authority is 3s. The statutes published by the Council of Law Reporting are also printed in the same form by the Stationery Office.

² See below, pp. 49, 64.

The three groups are distinguished by different modes of numbering. Public General Acts have their chapters in Arabic characters (62 & 63 Vict., No. 10); Local Acts in small Roman numerals (62 & 63 Vict., No. x); Private Acts (if printed) in italicized Arabic figures (62 & 63 Vict., No. 10). The Local Acts of each session, including those which, though passed as public Acts, are treated as local, and on that ground excluded from the category of Public General Acts, are printed sessionally in separate volumes. Owing to their bulk and number, the local Acts of each session cannot usually be included in a single volume. Private Acts are not always printed; but a list of those passed in each session will be found in the 'Table of the Local and Private Acts arranged in Classes,' under the heading 'Personal Affairs.'

The term 'Private Act' in its narrowest sense means an Act belonging to the third of the groups mentioned above. Acts of this class are passed for purely personal objects, such as the extension of powers to deal with land subject to a particular settlement, and each of them contains a provision that it is not to be deemed public. They are now few in number, the necessity for most of them having been superseded by general legislation, such as that which has extended the powers of tenants for life to deal with land. In ordinary usage, however, the term 'Private Act' is often employed in a wider sense, as including all measures introduced as private Bills. The former distinction merely affects the mode of promulgation and the arrangement of the contents of the Statute Book¹. A public Bill when passed may eventually be promulgated and printed as a local Act. But the distinction between public and private Bills is, as will be seen hereafter, much more important.

Distinction
between
Public
and
Private
Acts.

Every local Act is a public general Act. Before 1851 an enactment to this effect was contained in each local Act; but these special enactments were superseded in 1851 by a provision in Lord Brougham's Act², which is now embodied in

¹ See below, p. 48.

² 13 & 14 Vict. c. 21.

CH. II. the Interpretation Act, 1889¹. Before 1798 the only distinction in the Statute Book was between public and private Acts. The latter class included not only Acts of a personal character, such as Estate Acts, Divorce Acts, and Naturalization Acts, but also certain Acts which would be now treated as local—e. g. Drainage Acts and Inclosure Acts. But the great majority of the Acts now classed as local were then included among the public Acts. From 1798 to 1868 the Acts printed in the Statute Book were divided into public general Acts and local and personal Acts, according as they originated as public or private Bills. But since 1868, Acts which originate as public Bills, but are of a local character, are not promulgated as public Acts, and are printed among the local Acts.

Distinction
between
Public
and
Private
Bills.

The distinction between public and private Bills is, as has been said, much more important. A private Bill is a measure for the interest of some person or class of persons, whether an individual, a corporation, or the inhabitants of a county, town, parish, or other locality, and originates on the petition of the person or persons interested.

A public Bill is introduced as a measure of public policy in which the whole community is interested, and originates on the motion of some member of the House in which the Bill is introduced.

The object of a private Bill is, in fact, to obtain a privilege²,—that is to say, an exception from the general law, or a provision for something which cannot be obtained by means of the general law, whether that general law is contained in a statute or is Common Law.

Private and public Bills differ not merely in the mode of origination, but in the mode of procedure for passing them. In the case of a private Bill the rules of the Standing Orders of the two Houses as to the giving of certain notices and the

¹ 52 & 53 Vict. c. 63, s. 9. See below, p. 339.

² As to the origin and early history of private Bills, see the interesting evidence given by Sir Francis Palgrave before the Select Committee on Public Petitions in 1832 (*H. C. Papers*, 1833, vol. xii. p. 171).

deposit of Bills before a certain date must be complied with, in order that all persons may have notice if their private interests are affected. Each Bill is considered by a Select Committee of each House, who hear the promoters and opponents by counsel, consider their private interests, and determine, in a quasi-judicial capacity, whether the promoters of the Bill have justified their request for a privilege, and whether private interests are properly protected.

The officers of the House and the different Government departments watch private Bills from the point of view of the public interest, and call the attention of the Select Committee to matters affecting that interest. The House of Commons also appoint annually a special committee on Police and Sanitary Regulation Bills, for the purpose of guarding against the insertion of enactments inconsistent with the general law.

Subject to these provisions for the protection of public interests, the proceedings on a private Bill resemble more closely private litigation between the parties interested than a discussion on questions of public policy, though, as each Bill has to go through the same stages in the whole House as a public Bill, there is an opportunity for members to raise at those stages questions of public policy in respect of the Bill.

Public Bills are considered mainly from the side of public policy. But when a public Bill affects private interests in such a manner that if it were a private Bill the Standing Orders would require notices to be given, it is called a hybrid Bill, and the practice is to refer the Bill to the examiners of Standing Orders like a private Bill, and to make the Bill proceed in nearly the same way as if it were a private Bill. For instance, it is considered by a select committee in a quasi-judicial capacity, and counsel are heard for and against it. Bills relating to Crown property must, if promoted by the Crown, be dealt with in this way, because the Crown cannot petition Parliament.

CH. II.

The boundary line between public Bills and private Bills, and between the private interests which require a public Bill to be treated as a hybrid Bill and those which do not, is very narrow, and has fluctuated from time to time. Bills relating to particular localities only are, as a rule, treated as private Bills. But a Sunday Closing Bill for Wales and another for Cornwall were held to be rightly introduced as public Bills. Measures relating to the whole of London are frequently, perhaps usually, dealt with as public Bills, 'the large area, the number of parishes, the vast population, and the variety of interests concerned constituting them measures of public policy rather than of local interest¹.' But the practice has not been uniform. The Metropolis Management Act, 1855, which was a public Act, gave certain powers to the Metropolitan Board of Works to borrow money. Other powers of borrowing money were given to that Board, partly by public Acts, like the Thames Embankment Act, 1862, partly by local Acts, dealing with local improvements. In 1869 a general Act regulated the Board's power of borrowing, and from that date till 1888 their powers of borrowing were given annually by a public Act. In 1889 the Standing Orders were altered, and the London County Council now have an annual Bill enabling them to borrow money.

In most towns the buildings and streets are regulated partly by local Acts and partly by the Public Health Acts. In London they have been regulated partly by local Acts—e.g. the Acts relating to the city, or Michaelangelo Taylor's Act². But in 1844, and subsequently, they have been regulated by public Acts. In the session of 1894 a measure for consolidating the building law in London outside the city was introduced and passed as a private Bill, which became law as the London Building Act, 1894³.

The Thames Conservancy was constituted partly by local Acts, partly by public Acts. In 1894 a Bill repealing all

¹ *May's Parliamentary Practice*, 10th ed., p. 634.

² 50 Geo. III. c. lxxv.

³ 57 & 58 Vict. c. cxxiii.

these Acts and reconstituting the Conservancy was passed as a private Bill, and became a local Act¹.

The general rule that where legislation deals with one particular locality only it ought to proceed by way of private Bill, is based on the view that the locality is entitled to be heard quasi-judicially on the provisions of the enactment. For this reason it is unusual to insert in a public Bill a clause dealing with a particular locality. Where, however, special provision for a particular locality has to be made, the rule is sometimes evaded by not naming the locality, but so stating the circumstances that the provision can only apply to the particular locality in question.

In some cases private Bills have been defeated by a resolution of the House that they ought to be dealt with as public Bills. Instances are supplied by the Manchester Education Bill, 1854, the Liverpool Licensing Bill, 1865, and the Keble College Bill, 1888. The Presbyterian Church of Ireland Bill, 1871, was introduced as a private Bill, but was withdrawn in consequence of an objection that the matter ought to be dealt with by public legislation; and a public Bill, which became law as the Irish Presbyterian Church Act, 1871² took its place.

A consideration of the different precedents and varying practice shows that the boundary line between public and private Bills depends not merely on whether the Bill comes within the Standing Orders relating to private Bills, or does or does not affect a particular locality only, but also on questions of policy, on the circumstances and political questions of the time, and on the general character of the Bill. On the one hand, it would not be right that a measure required by the general public interest on general grounds of public policy should not be passed merely because it is objected to by particular persons or localities whom it would affect. On the other hand, it would not be right that a particular person or locality should be allowed to obtain any *privilegium incon-*

¹ 57 & 58 Vict. c. clxxxvii.

² 34 & 35 Vict. c. 24.

CH. II.
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sistent with what is considered at the time to be true public policy. In some cases it may be convenient that a municipality should be authorized by private Bill to try a particular experiment which is not inconsistent with general public policy. If the experiment is successful, it may be afterwards adopted as a matter of general legislation. Again, there may be cases where the general law will not meet the circumstances of a particular locality. Thus, a law suitable to the great majority of towns may be found inapplicable to the large populations of such places as Liverpool or Glasgow.

It seems therefore impossible to lay down a hard and fast rule as to the subjects which should and which should not be dealt with by private Bills. Certain principles should be observed, such as that a private Bill should not, except for very strong reasons, deal with certain subjects, including the public revenue, the administration of justice, or the constitution or election of local governing bodies. But the boundary line will vary, and ought to vary, from time to time. Circumstances and the requirements of localities change. Old needs pass away and new needs arise. If experiments by private Bills had not been allowed, some of our public legislation would not have taken place. Of course these experiments ought to be carefully watched, and probably there ought to be some special machinery, such as the Select Committee now appointed annually by the House of Commons on Police and Sanitary Regulation Bills, for the purpose of determining the cases in which they should be allowed.

As has been said above, experiments in private legislation have often led to public legislation. A good instance is supplied by the Public Health Acts Amendment Act, 1890¹, which enables any sanitary authority to adopt various enactments which had been frequently embodied in measures introduced as private Bills.

A very large number of matters which used to be dealt with by private legislation can now be dealt with under the

¹ 53 & 54 Vict. c. 59.

general law. Thus, the Divorce and Naturalization Acts, which were so common in the last century, are now superseded in most cases by general enactments. Most of the Estate Acts have been made unnecessary by such Acts as the Settled Land Acts, 1882 to 1890. Amendments of the general company law have removed the necessity for much special legislation about companies, and many matters for which private Bills were formerly required can now be dealt with by the machinery of Provisional Orders.

The Bills to confirm the numerous Provisional Orders now made, under statutory authority, by the Local Government Board, the Board of Trade, and other Government departments, are introduced as public Bills by the Minister in charge of the department which made the order, are referred to the examiners for consideration, and if any of the orders scheduled to a Bill for confirmation is opposed, the Bill is treated as a private Bill for the purpose of investigation in committee¹.

Acts to confirm Provisional Orders, and other Acts which, though introduced as public Bills, are considered to be of a local character, are, as a rule, included in the group of local Acts, but distinguished by having the letter 'P' prefixed to their number in the group. To this class belong the Acts which are occasionally passed to remove doubts as to the validity of marriages celebrated in particular places of worship.

A chronological table and index of the statutes is published annually under the direction of the Statute Law Committee. In its latest form this work consists of two volumes, which are arranged for combined use. The first volume contains a chronological table of all the statutes, showing total or partial repeals; the second contains an index to the subject-matter of the statutes in force. The chronological table is based on the edition of the Record Commission, known as the *Statutes of the Realm*, as far as that edition extends—namely, to the end of the reign of Queen Anne (1713). Thence-

¹ *Standing Orders, House of Commons*; Clifford, vol. i p. 270.

CH. II. forward it follows Ruffhead's edition (by Serjeant Runnington, 1786), so far as it extends—namely, to the end of the session 25 Geo. III, 1785. From that date, it is believed, all editions are alike. The following extract from the preface to the fifteenth edition shows the principle on which particular classes of statutes have been included in or excluded from the chronological table:—

'The chronological table covers the whole period between the passing of the earliest statute of the Parliament of England (1235) and the end of the fifth session of the Twenty-sixth Parliament of the United Kingdom of Great Britain and Ireland—namely, the session 62 & 63 Vict., 1899. Ante-Union Acts of the Parliaments of Scotland and Ireland are not comprised in the table. Acts of the Parliament of England extended to Ireland by Poyning's Act, 10 Hen. VII. c. 22 (I), are, in relation to Ireland, treated as Ante-Union Acts of the Parliament of Ireland, with the exception that the repeals of such enactments by the Statute Law Revision (Ireland) Act, 1872, are noted.

'The chronological table comprises all Acts printed in the *Statutes of the Realm*, and after the end of that edition all Acts printed by the King's or Queen's Printers as public or as public general.

'Many of these Acts, however, cannot be regarded as public Acts, affecting the community generally, being in their nature special or private Acts, relating to particular persons or places or to private concerns. Acts of this kind are distinguished by the italic entries *Local, Personal, Private*, in the second column of the table (except in a few cases in which they are shown to be not in force); and the table does not profess to show repeals affecting these Acts. Further means of reference to the provisions of these Acts is afforded by the indexes to the local and personal Acts compiled by order of the Select Committee on the Library of the House of Lords, which cover the period 1810 to 1887, and by the classified lists of local Acts annexed to the annual volumes of the statutes. The second volume of the chronological table gives, as regards all Acts of a public nature, wholly or partly in force, the titles of subject-matters under which they are to be found in the 'Index to the Statutes in Force'; and as regards Acts spent or repealed, gives in italic type either the short title of the repealed Act or a general indication of its subject-matter.'

The index is framed in accordance with instructions prepared by Lord Thring in 1876. It is followed by a series of appendices containing references to various Acts, mainly of

a local character, which were printed among the public or public general Acts, but which, for various reasons, it has been considered undesirable to index in detail. Ch. II.
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Local and private Acts have not been indexed in the same manner or to the same extent as public general Acts. Until 1798 local Acts were not numbered or printed separately from general Acts. It is estimated that the number of Acts of a local, personal, or private character passed before the present century is upwards of 11,000, and that upwards of 21,000 Acts of a similar character have been passed during the present century. In 1867 an index, or rather a classified list, of statutes passed between 1801 and 1865, was published by order of the House of Lords, but is now out of print. It was divided into two parts, the first containing public general Acts, and the second local and private Acts. The second part was supplemented by additional volumes published in 1878 and 1890. But this index has now been superseded by a classified list of all the local and private Acts (including Provisional Orders confirmed by Local Acts) from 1801 to 1899, which was prepared under the direction of the Statute Law Committee, and was published in 1900. Lists of
Local and
Private
Acts.

CHAPTER III

SUBORDINATE LEGISLATION

CH. III. IN the earlier stages of Parliamentary legislation, the border line between laws made by the Crown in the exercise of the Royal prerogative and laws made by Parliament with the assent of the Crown, between Charters, Ordinances and Orders in Council on the one hand, and Acts of Parliament on the other, was not definitely drawn¹. In the year 1539² Henry VIII made a bold and interesting attempt to take the power of legislating by proclamation, an attempt which, if it had been successfully maintained, would have introduced the system of 'administrative law' prevailing in Continental countries. But his Statute of Proclamations was repealed in the reign of Edward VI³, and in 1610⁴ a protest of the judges 'established the modern doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law, but they cannot of themselves impose upon any man any legal obligation or duty not imposed by Act of Parliament⁵.' Thus it was gradually recognized that a law made by the authority of Parliament could not be altered except by the same authority. And, as

¹ See Introduction to *Statutes of the Realm*, pp. xxxi, xxxii; Stubbs, ii. 615-619.

² 31 Henry VIII. c. 8. See Stubbs, ii. 619; Anson, i. 260.

³ By 1 Edw. VI. c. 12, s. 4.

⁴ *Coke, Reports*, xii. 74; Gardiner, *History of England*, ii. 104.

⁵ Dicey, *Law of the Constitution*, p. 51. Mr. Dicey notes that Lord Chatham's proclamation of 1766 prohibiting the exportation of wheat was probably the last attempt of the Crown to make law by force of proclamation.

the number of Acts and of the subjects with which they dealt increased, the legislative sphere of the royal prerogative was proportionately diminished, and has now been reduced within very narrow dimensions¹.

On the other hand, the increasing complexity of modern administration, and the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion, has led to an increase in the practice of delegating legislative powers to executive authorities.

'When an English or an American legislator drafts a statute,' says Mr. Lowell in his interesting book on *Governments and Parties in Continental Europe*², 'he tries to cover all questions that can possibly arise. He goes into details and describes minutely the operation of the Act, in order that every conceivable case may be expressly and distinctly provided for. He does this because there is no one who has power to remedy defects that may subsequently appear. If the law is vague or obscure, it can receive an authoritative interpretation only from the courts by the slow process of litigation. If it is incomplete, it must remain so until amended by a subsequent enactment.'

This description, so far as it relates to English Acts, is less accurate than it would have been some years ago. The tendency of modern parliamentary legislation in England has been in the direction of placing in the body of an Act merely a few broad general rules or statements of principles, and relegating details either to schedules or to statutory rules.

A schedule is merely part of an Act, and, unless it is made alterable by executive authority, the question whether a provision or set of provisions should appear in the body of an Act or in a schedule is a question of form and parliamentary

¹ Certain Orders in Council and Regulations, such as the King's Regulations with respect to the Army and Navy, are still made in the exercise of the royal prerogative and not under any statutory authority. The Crown has also power to legislate by Order in Council for a newly conquered country. See Dicey, *Law of the Constitution*, p. 51.

² i. 44.

CH. III. practice, and will be dealt with as such in Chapter XI, which
relates to the form and arrangement of Acts.

But the question whether a particular rule ought to be embodied in an Act or left to be made by a subordinate authority, the question whether, to what extent, and under what safeguards and restrictions, the exercise of legislative power should be delegated, is a question of principle.

In Continental countries, as is well known, the delegation of legislative powers is far more extensively exercised than in England or in English-speaking countries. In France, statutes are often couched in general terms and enunciate a principle which the executive is to carry out in detail. 'Sometimes the President of the Republic is expressly given power to make regulations, but even without any special authority he has a general power to make them for the purpose of completing the statutes, by virtue of his general duty to execute the law ¹.' Power to make similar regulations is often conferred on ministers or prefects, and on mayors. The regulations thus made are described in France as secondary legislation. The President's ordinances are called *décrets*, and the regulations issued by other officials are distinguished as *arrêtés*.

In Italy the power of the executive officials to make regulations is even more extensively used. The constitution declares that 'the king makes the decrees and regulations necessary for the execution of the laws without suspending their observance or dispensing with them.' But the interpretation put upon this provision is so broad that the Government is practically allowed to suspend a law subject to responsibility to Parliament, and even to make temporary laws which are submitted to Parliament later. And Parliament uses very freely the power of delegating legislative power to the Ministers. 'In the case of the recent Criminal Code, for example, the final text was never submitted to the Chambers

¹ See Lowell, i. 45, and the authorities there quoted.

at all, but, after the subject had been sufficiently debated, the Government was authorized to make a complete draft of the code, and then to enact it by royal decrees, harmonizing it with itself and with other statutes, and taking into account the views expressed by the Chambers. The same was true of the electoral law of 1882, of the recent laws on local government and on the Council of State, and of many other enactments¹. Without express power for the purpose, the ministers, prefects, syndics, or other officials are in the habit of making decrees on subjects of minor importance.

Such extensive delegation of legislative powers would not be tolerated in England. 'Every Anglo-Saxon feels that a power so indefinite' (as that of making regulations) 'is in its nature arbitrary, and ought not to be extended any farther than is absolutely necessary².' Englishmen have a deep-seated distrust of official discretion, a deep-seated scepticism about bureaucratic wisdom. The ordinary Englishman, as represented by the average member of Parliament, would find much difficulty in assenting to the proposition laid down by an eminent author that 'the substance no less than the form of the law would, it is probable, be a good deal improved if the executive government of England could, like that of France, by means of decrees, ordinances, or proclamations having the force of law, work out the detailed application of the general principles embodied in the Acts of the legislature³.' If his liberty of action is to be subjected to restraint, he prefers that the restraint should be imposed by laws which have been made after public discussion in a representative assembly. He will readily admit that the application of a different principle is in accordance with the habits and traditions of Continental countries, and is necessary in countries like India, but he dislikes its application at home. Therefore, although he acknowledges the impossibility of providing for every detail

¹ Lowell, i. 165.

² Lowell, i. 44.

³ Dicey, *Law of the Constitution*, p. 50.

CH. III. in an Act of Parliament, and the consequent necessity of leaving minor matters to be regulated by statutory rules or by executive discretion, he scrutinizes with a jealous eye provisions which delegate the power to make such rules, or which leave room for the exercise of such discretion, and insists that they should be carefully expressed and limited, and be hedged round with due safeguards against abuse. It may indeed be said that this jealousy is a survival from an older state of things, and that in a country like modern England public opinion is the most effectual, and is usually a sufficient, safeguard against any serious abuse of statutory powers. It may also be doubted whether the control of Parliament over the details of legislation and administration is less effective in the present day than it was in days when Acts of Parliament were more minute in their provisions. For instance, a reference to Hansard will show that within comparatively recent times the number of the members who took part in a legislative debate, and the number of the amendments moved, was far smaller than it is now, and that there was a much greater readiness to take long and complicated measures on trust, and to accept them without examination of details. These considerations are of weight, and supply a sound argument for justifying the modern practice of delegating power to legislate on matters of minor importance. It is indeed the increased vigilance and intelligence of members and their constituents which has increased the difficulty of passing legislative measures through Parliament, and has rendered necessary the adoption of various expedients for shortening and simplifying their form, expedients of which the delegation of legislative powers is among the most legitimate. But, unless the temper of Parliament should materially change, attempts to give delegated powers in unduly wide terms, or to extend them beyond matters of minor importance, or to strain their exercise, would produce a reaction which would have a mischievous and embarrassing effect on the form of parliamentary legislation. If, however, the delegation of legislative powers is kept within

due limits and accompanied by due safeguards, it facilitates both discussion and administration. CH. III.

It facilitates discussion because it concentrates attention on the main questions, and prevents waste of time on minor and subordinate issues. It facilitates administration because every administrative change is in the nature of an experiment. The precise mode in which the change will work out, the exact means by which its object can best be effected, cannot be determined with certainty beforehand, and consequently the machinery must be made elastic. This elasticity can best be given by allowing the details to be worked out on the general lines laid down by the supreme legislature, either by statutory rules or by official practice, subject to the check of public opinion and questions in Parliament.

As has been said, public opinion is, in a country like modern England, a very powerful safeguard against any serious abuse of statutory powers. But Parliament not unfrequently reserves to itself some kind of control over the powers which it has delegated¹. The rules and orders made under those powers are often required to be laid before both Houses of Parliament. Sometimes there is an express power of disallowance by resolution of either House. Sometimes a draft of the rules or orders is required to be laid before Parliament, and they are not to come into operation until a specified period has elapsed after they have been so laid. But this last requirement would often involve serious and inconvenient delay. Perhaps the most practical of the statutory safeguards against hasty and insufficiently considered legislation under delegated powers is the obligation imposed by the Rules Publication Act, 1893², to publish a preliminary draft for criticism. This obligation applies, subject to some very important exceptions, to all rules which are required by statute to be laid before Parliament. It is naturally distasteful to Government departments, and is unnecessary and may be inexpedient in the case of rules which merely affect the internal arrangements of a department.

¹ See p. 310.

² 56 & 57 Vict. c. 66, printed below, p. 358.

CH. III. But in this case a statutory power to make rules is rarely required. When the rules affect any important class or section of the public, the obligation corresponds to the conditions usually attached to the making of local by-laws, and may be justified on the same grounds.

The objection that the law embodied in statutory rules is less known and less easy to find than the law embodied in Acts of Parliament was, until recently, substantial and serious. But under arrangements which came into force in 1890 the statutory rules of each year are now published in a form corresponding to that of the annual statutes; an index to them, in a form corresponding to the index to the statutes, is periodically revised and published; and the rules of the years preceding 1890 have been collected and published under the title of *The Statutory Rules and Orders Revised*, in a form resembling that of the Revised Statutes.

The volumes thus published illustrate the extent and importance of the legislation effected under delegated powers. For instance, the volume containing the Statutory Rules and Orders for 1890 runs to nearly 1,100 pages, and contains (among other things) a set of bankruptcy rules, a set of rules for Civil Bill Courts in Ireland, a set of rules for the winding up of companies, the revised code under the Elementary Education Acts, important Orders in Council under the Foreign Jurisdiction Acts, a long set of rules under the Lunacy Act, 1890, and sundry rules under the Patent Acts and Merchant Shipping Acts. Under the Judicature Acts and the County Court Acts the duty of framing what in other countries would be called codes of civil procedure has devolved on subordinate legislative authorities, known as Rules Committees, and consisting of judges and other officials and representatives of the legal profession.

CHAPTER IV

STAGES IN THE IMPROVEMENT OF THE ENGLISH STATUTE LAW

THE existing condition of the English Statute Book has been described in Chapter II. The object of the retrospect embodied in the present chapter is to give some account of the attempts which have been made in the past to improve the form of the English Statute Law. How far have these attempts been successful, how far abortive? The experience of the past may throw some useful light in the direction in which attempts at improvement are likely to succeed in the future.

In the year 1551 that precocious monarch King Edward VI, then a boy of fourteen, wrote as follows in his *Discourse on the Reformation of Abuses*: 'I have showed my opinion heretofore what statutes I think most necessary to be enacted this Session. Nevertheless, I would wish that beside them hereafter, when time shall serve, the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them; which thing shall much help to advance the profit of the Commonwealth¹.' But this, observes Bishop Burnet², was too great a design to be set on foot or finished under an infant king.

The subject of the consolidation and expurgation of the statutes was brought forward from time to time in the reign of Queen Elizabeth.

¹ *Literary Remains of Edward VI*, ii. 486. See Burnet, *History of Reformation*, ii. 272.

² *History of Reformation*, ii. 181.

CH. IV.
Object of
chapter.

Proposals
under
King Ed-
ward VI.

Proceed-
ings under
Queen
Elizabeth.

CH. IV. of Queen Elizabeth¹. The Statute of Labourers of 1562 (5 Eliz. c. 4) is one of the earliest examples of Consolidation Acts, and its preamble expresses in the language of the time the reasons which made consolidation expedient.

‘Although there remayne and stande in force pntly a greate number of Actes and Statutes concerning the reteynyn departing wages and orders of Apprentices Servantes and Labourers, as well in Husbandrye as in divers other Artes Misteries and occupacons, yet pty for thimperfeccon and contrarietie that ys founde and doo appeare in sundrye of the sayde Lawes, and for the varyetie and number of them, and chiefly for that the wages and allowances lymytted and rated in many of the sayd Statutes, are in dyvers places to small and not answerable to this tyme, respecting thadvancement of Pryses of all things belonging to the sayd Servantes and Labourers, the said Lawes cannot conveniently without the greate greefe and burden of the poore Labourer and hired man, bee put in good and due execution: And as the sayd severall Actes and Statutes were at the time of the making of them thought to be very good and beneficiall for the Comon wealthe of this Realms as dyvers of them yet are, So yf the substance of as many of the said Lawes as are meet to bee continued shalbe digested and reduced into one sole Lawe and Statute, & in the same an uniforme Order prescrybed and lymitted concerning the Wages and other Orders for Apprentises Servauntes and Laborers, there ys good hope that yt will come to passe that the same Lawe, beyng duly executed, should banishe Idlenes advance Husbandrye and yelde unto the hired pson bothe in the tyme of scarsitee and in the tyme of plentye a convenient porcon of Wages.’

Sir Nicholas Bacon, when Lord Keeper, drew up a scheme for reducing, ordering, and printing the statutes of the realm, of which the heads were as follows:—‘First, where many lawes be made for one thing, the same are to be reduced and established into one lawe, and the former to be abrogated. Item, where there is but one lawe for one thing, that these are to remain in case as they be. Item, that all the Acts be digested into titles and printed according to the abridgment of the statutes. Item, where part of one Acte standeth in force and another part abrogated, there shall be no more printed, but that that standeth in force. The doeing of these

¹ *Dewes's Journals*, pp. 345, 469, 473, 553, 622; Introduction to *Statutes of the Realm*, p. xxvi. Sir Francis Bacon took part in some of these discussions.

things maie be committed to the persons hereunder written, if CH. IV.
 it shall so please Her Majestie and her Counsell, and daye
 wolde be given to the committees until the first daie of
 Michlemass Terme next coming for the doing of this, and
 then they are to declare their doings, to be considered by
 such persons as it shall please Her Majestie to appoint¹.

King James I, in a speech from the throne (1609)², spoke Proposals
under
King
James I.
 of 'divers cross and cuffling statutes, and some so penned that
 they may be taken in divers, yea, contrary senses'; adding
 'and therefore would I wish both these statutes and reports,
 as well in the Parliament as common law, to be once maturely
 reviewed and reconciled; and that not only all contrarieties
 should be scraped out of our bookes, but even that such penal
 statutes as were made but for the use of the time (from
 breach whereof not man can be free) which dos not now
 agree with the condition of this our time, might likewise
 be left out of our bookes, which under a tyrannous or
 avaricious king could not be endured. And this reformation
 might (me thinkes) bee made a worthy worke, and well
 deserves a Parliament to be set of purpose for it.' A com-
 mission was appointed in the following year, and a MS. in
 the British Museum is probably the fruit of its labours³.
 It contains a list of the statutes from 3 Edw. I to 2 Jas. I
 which had been repealed or had expired, and suggestions for
 further repeals and changes.

In 1616, Sir Francis Bacon, then Attorney-General to Lord
Bacon's
proposals
of 1616.
 King James the First, submitted to the king a proposition
 'touching the compiling and amendment of the laws of
 England⁴.'

'The work to be done,' according to this proposition, 'con-
 sisteth of two parts, the digest or recompiling of the common
 laws, and that of the statutes.'

¹ MS. Harl. 249; *Intro. to Statutes of the Realm*, p. xxvi.

² *Works of James I*, London, 1606, p. 534.

³ MS. Harl. 244; *Intro. to Statutes of the Realm*, p. xxvi.

⁴ *Bacon's Letters and Life*, by Spedding, vi. 57. See also *Bacon's Works* (Spedding), v. 99; vii. 14.

CH. IV. 'For the reforming and recompiling of the statute law it consisteth of four parts.

'1. The Government to discharge the books of those statutes whereas' (*qu. wherein*) 'the case by alteration of time is vanished, as Lombards, Jews, Gauls, halfpence, &c. Those may, nevertheless, remain in the libraries for antiquities, but no reprinting of them. The like of statutes long since expired and clearly repealed; for if the repeal be doubtful, it must be so propounded to Parliament.

'2. The next is to repeal all statutes which are sleeping and not of use, but yet snaring and in force. In some of those it will perhaps be requisite to substitute some more reasonable law instead of them, agreeable to the time; in others a simple repeal may suffice.

'3. The third, that the grievousness of the penalty in many statutes may be mitigated, though the ordinance stand.

'4. The last is the reducing of convenient statutes heaped one upon another to one clear and uniform law.'

Of the last part, he said, much had been done by Lord Hobart, himself, Serjeant Finch, Heneage Finch, Noye, Hackwell, and others. The best way to carry out the work would be to have commissioners appointed by the two Houses.

Proceed-
ings under
the
Common-
wealth.

During the time of the Commonwealth a strong desire was manifested to make every practical reform of the law, and among other things a consolidation of the statutes was not forgotten. Two committees on the subject were appointed, among the members of whom were Sir Bulstrode Whitelocke, Sir Matthew Hale, and Ashley Cooper, afterwards Lord Shaftesbury. The instructions were 'to revise all former statutes and ordinances now in force, and consider, as well, which are fit to be continued, altered, or repealed, as how the same may be reduced into a compendious way and exact method for the more ease and clearer understanding of the people¹.' But no tangible results appear to have been achieved.

¹ *Commons' Journals*, vi. 427.

After the Restoration, the subject was again inquired into by Lord Nottingham and others, but nothing was done, and the question appears to have slumbered until the end of the eighteenth century¹.

CH. IV.
—
Proceedings after Restoration.
Reports of 1796.

In 1796 two interesting reports were presented by committees of the House of Commons on temporary laws and the promulgation of the statutes². The first report refers to the proceedings of former committees on temporary laws; to proposals for the revision of the statutes; to former Consolidation Acts such as Queen Elizabeth's Act for the regulation of artificers (5 Eliz. c. 4), and the Acts of George III relating to the navy, gunpowder, highways, militia, and the Custom House; and to the meaning and classes of obsolete statutes, expired Acts, and temporary Acts. It gives instances of Acts suffered to expire by mistake, of discordant statutes (the 'divers cross and cuffling statutes' of King James I), and of hotch-potch Acts. With respect to the last class, it remarks that they have been discontinued of late years, but that the Statute Book abounds with them. For instance, in 20 Geo. II. c. 42, for explaining the Window Tax Act, was to be found a section (3) that all existing and future statutes which mentioned England should also extend to Wales and Berwick-upon-Tweed, though not particularly named; after which, s. 4 reverts to the Window Tax again³.

The report on the promulgation of the statutes lays down the requisites with which every Bill ought to be introduced into Parliament, and refers to the importance of punctuation, and to the desirability of numbering sections, of adding marginal notes, and of stating more precisely the duration of statutes and the date at which they are to come into

¹ *Introd. to Statutes of the Realm*, p. xxvii.

² *Reports of Committees of House of Commons*, xiv. 34, 119. Extracts from these reports are printed in an appendix to a report presented by Mr. Bellenden Ker to the Lord Chancellor on August 12, 1853.

³ It may be observed that s. 3 is the sole surviving provision of this statute.

CH. IV. operation. With respect to promulgation, the committee remark that, 'the only mode in which the statutes are now promulgated is the publication of them by the Queen's Printer. Your committee have not been able to discover at what precise period of time the statutes of the realm were first printed by public authority, but it appears that the ancient mode of promulgating them by the sheriff's proclamation fell into disuse very soon after the introduction of the art of printing.'

The report also gives some curious instances of errors of typography and punctuation, and refers to the difference between public and private Acts.

It appears from the first report that all the Acts of each session, whether public or private¹, were entered on the Statute Roll in a single continuous series, but that as printed by the King's Printer they were divided into two sets, public and private, each with separate numbers. Consequently, the numbers denoting the chapters on the Statute Roll did not correspond to the numbers denoting the chapters on the King's Printer's copies². It also appeared that the numerical marks prefixed in print to each chapter, and the figures prefixed to each clause by way of section, as well as the marginal abstract of each clause, and the punctuation, were wholly the work of the King's Printer, and rested on his private authority.

The second report pointed out that in the annual volume of the statutes, the Acts which were political, and legally speaking of a public and general nature, bore a very small proportion to the whole mass³, that the local Acts respecting

¹ It was in the year 1539 (31 Henry VIII) that the distinction between public and private Acts was, for the first time, stated on the enrolment in Chancery. Introd. to *Statutes of the Realm*, p. xxxiii.

² As to the origin, early history, duties and privileges of the King's Printer, see *Basket v. University of Cambridge* (1758), Blackstone, i. 105.

³ The following note is appended to the report:—

'PUBLIC AND PRIVATE ACTS:—I. IN LEGAL LANGUAGE.—(1) Acts are deemed to be Public and General Acts, which the judges will take notice of without pleading, viz. Acts concerning the King, the Queen,

drainage, bridges, churches, canals, &c., which by special clauses and by particular usage were declared to be public, filled more than double the space occupied by the first and more important class, and that this excess was the more striking as the Road Acts were not included in the estimate of the local Acts, not being printed with the rest of the statutes.

Cur. IV.

These reports led to an improvement in the classification of Acts. In conformity with joint resolutions passed by the two Houses of Parliament in 1796¹, statutes passed in 1798 and subsequent sessions were divided into three classes:— (1) Public General Acts; (2) Local and Personal Acts declared public and to be judicially noticed; (3) Private and Personal Acts. Acts of the third class were not ordered to

Improvement in classification of Acts.

and the Prince; those concerning all Prelates, Nobles, and great Officers; those concerning the whole Spirituality; and those which concern all Officers in general, such as all Sheriffs, &c.—Acts concerning trade in general, or any specific trade.—Acts concerning all persons generally, though it be a special or particular thing, such as a Statute concerning Assizes, or Woods in Forests, Chases, &c. *Comyn's Dig. tit. Parliament* (R. 6). (2) Private Acts are those which concern only a particular species, or thing, or person, of which the judges will not take notice without pleading them, viz. Acts relating to the Bishops only; Acts for toleration of Dissenters; Acts relating to any particular place or town, or to divers particular Towns, or to one or divers particular Counties, or to the Colleges only in the Universities. *Comyn's Dig. tit. Parliament* (R. 7). (3) In a General Act there may be a Private clause, *ibid.*; and a Private Act, if recognized by a Public Act, must afterwards be noticed by the courts as such. *2 Term. Rep. 569.*

‘II. IN PARLIAMENTARY LANGUAGE.—(1) The distinction between Public and Private Bills stands upon different grounds as to fees.—All Bills whatever, from which private persons, corporations, &c. derive benefit, are subject to the payment of fees, and such Bills are in this respect denominated Private Bills.—Instances of Bills within this description are enumerated in the second volume of Mr. Hassell's *Precedents of Proceedings in the House of Commons*, edit. 1796, p. 268, &c.—(2) In Parliamentary Language, another sort of distinction is also used; and some Acts are called Public General Acts; others Public Local Acts, viz. Church Acts, Canal Acts, &c. To this class might also be added some Acts which, though Public are merely Personal, viz. Acts of Attainder, and Patent Acts, &c.; and others are called Private Acts; of which latter class, some are local, viz. Inclosure Acts, &c., and some Personal, viz. such as relate to Names, Estates, Divorces, &c.’

¹ *Commons' Journals*, lii. 45.

CH. IV. be printed. By the resolutions of 1796 the King's Printer was directed to class the public general statutes and the public local and personal statutes of each session in separate volumes, to number the chapters of each class separately, and also to print one general title to each volume, together with a general table of all the Acts passed in each session. In the year 1814 another change of classification was made by the division of all statutes after that date into four classes:— (1) Public General Acts; (2) Local and Personal Acts declared to be public and to be judicially noticed; (3) Private Acts printed by the King's Printer, copies of which may be given in evidence; and (4) Private Acts not so printed.

Resolutions of 1800.

Resolutions passed by the Parliament of 1800 led, as has been said above¹, to the appointment of the first Commission on Public Records and to the preparation, under their authority, of the edition known as *The Statutes of the Realm*.

Resolution of Public Records Commission, 1806.

In 1806 the Commission on Public Records passed a resolution that Francis Hargreaves, Esquire, should be requested to consider and report on the best mode of reducing the statute law into a smaller compass and more systematic form, and of revising and amending the same in whole or in part. Mr. Hargreaves wrote a memorial, which appears to have become the foundation of the resolutions subsequently passed by the Houses of Parliament.

Resolutions of 1816.

In 1816 both Houses of Parliament passed resolutions that a digest of the statutes should be made, and that an eminent lawyer with twenty clerks under him should be commissioned to do the work, which they unanimously declared 'very expedient to be done.' Nothing appears to have come of this, except a partial consolidation from time to time of certain subjects. For instance, the Acts relating to the slave trade, and to the excise and customs², and some criminal enactments, were consolidated.

¹ P. 21.

² In 1825, 452 Acts relating to the customs were repealed and replaced by 12 Acts (6 Geo. IV. cc. 104-115).

In the year 1826 Sir Robert Peel began a series of Acts which consolidated and amended portions of the then existing criminal law. The first of these was 7 Geo. IV. c. 64 (1826), which related to procedure. In 1827 four other Acts were passed, 7 & 8 Geo. IV. c. 28 (miscellaneous subjects), 7 & 8 Geo. IV. c. 29 (larceny and cognate offences), 7 & 8 Geo. IV. c. 30 (malicious injuries to property), 7 & 8 Geo. IV. c. 31 (remedies against the hundred). In 1828, 9 Geo. IV. c. 31 (offences against the person), was passed. In the same year and in the year 1829 were passed Acts which applied the statutes above mentioned to Ireland, with modifications. In 1830 was passed a Forgery Act (1 Will. IV. c. 66), which was not, however, extended to Ireland. In 1832 was passed a Coinage Act (2 Will. IV. c. 34).

In 1833, when Lord Brougham was Lord Chancellor, a Royal Commission was appointed, with instructions—

- (1) To digest into one statute all the statutes and enactments touching crimes and the trial and punishment thereof, and also to digest into one other statute all the provisions of the common or unwritten law touching the same;
- (2) To inquire and report how far it might be expedient to combine both those statutes into one body of the criminal law; and
- (3) Generally to inquire and report how far it might be expedient to consolidate the other branches of the existing law for England¹.

The Commissioners were paid. The first Commissioners were Messrs. Amos, John Austin, Bellenden Ker, Starkie, and Wightman. Mr. D. Jardine was afterwards appointed in the place of Mr. Austin². They presented a general

¹ It is interesting to note that Macaulay's Commission for digesting and codifying the law of India was appointed at about the same time as Brougham's Commission. It lingered on for many years after Macaulay's return from India, but its chief achievement was the Indian Penal Code, which, though drawn by Macaulay, did not become law till 1860.

² Mr. Austin did not find the work congenial and he resigned. See p. 11 of Mrs. Austin's preface to *Austin's Jurisprudence* (R. Campbell's edition).

CH. IV. report on the statute law in 1835¹, and seven reports on the criminal law at intervals down to 1843. According to Mr. Greaves², these reports contain a 'vast mass of most valuable information, together with many observations on the different parts of the criminal law, which are well deserving consideration by any one who may turn his attention to the importance of that branch of the law.' The Commissioners were engaged on an eighth report when they were dissolved at the beginning of the year 1845.

Sir Henry Seton's Reports of 1836.

In 1836, Sir Henry Seton submitted to a Committee of the House of Commons some learned and interesting notes on the statute law and a list of statutes showing how far they were in force or not. This list is of importance as the basis on which the subsequent expurgatory lists and the earlier Statute Law Revision Acts were framed.

Statute Law Commission of 1845.

At the beginning of the session of 1845 Lord Brougham introduced a Bill embodying the digest prepared by the Commission of 1833, but the Bill was withdrawn on an undertaking by Lord Lyndhurst that a second Commission should be appointed to revise it. Hence in 1845 a second Commission was issued to Sir Edward Ryan, and Messrs. Starkie, Ker, Amos, and Richards, instructing them to complete the unfinished report of the previous Commissioners, to consider the previous reports and the alterations therein suggested, and the expediency of consolidating into one or more statute or statutes the whole or any part or parts of the criminal law, written or unwritten, and to prepare a Bill or Bills for the purpose. This Commission made six reports, including the unfinished report of their predecessors, and appended to their report of March 30, 1848, a draft of a Bill containing 'An entire Digest of the written and unwritten Law relating to the Definition of Crimes and Punishments.'

On June 6, 1846, Lord Brougham introduced in the House of Lords the Bill so prepared, but it was not proceeded with.

¹ *Parliamentary Papers*, 1835, xxxv. 361.

² Preface to *Criminal Law Acts*, p. xv.

On July 3, 1849, the Commissioners made a report on procedure. This was their last work. CH. IV.

In the autumn of 1852, Lord St. Leonards (then Lord Chancellor) directed Mr. Lonsdale and Mr. Greaves to prepare Bills for the codification of the criminal law. Their directions were specific. They were to prepare each Bill from the reports of the Criminal Law Commissioners, and each Bill was to incorporate both the statute and common law relating to the offences contained in it. On these instructions an Offences against the Person Bill was prepared and introduced by Lord St. Leonards in 1853, and referred to a Select Committee of the House of Lords. Further steps for codification of criminal law.

In the early part of 1853, Lord Derby's Government went out of office, and Lord Cranworth succeeded Lord St. Leonards as Lord Chancellor. Messrs. Lonsdale and Greaves were, however, instructed by him to proceed with the Bills which they had been preparing for Lord St. Leonards, and accordingly they prepared a Larceny Bill and also Bills relating to burglary, malicious injuries, forgery, piracy, coin, public peace, and trade and commerce. The Offences against the Person Bill and the Larceny Bill were considered by the judges, but neither these nor the other Bills were introduced in 1854, and the attempt to codify the criminal law was for the time abandoned¹.

At the beginning of the session of 1853, Lord Cranworth announced his intention of devoting himself systematically to the improvement of the statute law, and sketched out an ambitious programme which he hoped might eventually result in a 'Code Victoria'². Lord Cranworth's proposals of 1853.

For the purpose of carrying out this work, Lord Cranworth appointed a Board for the Revision of the Statute Law, consisting of Mr. Bellenden Ker, as Commissioner, with Statute Law Board of 1843.

¹ In reply to a circular letter from Lord Cranworth, the judges expressed strong opinions against codification of the criminal law. *Parliamentary Papers*, 1854, liii. 391.

² *Hansard*, 124, p. 4.

CH. IV. Messrs. Coode, Chisholme Anstey, Brickdale, and Rogers, as sub-commissioners. The Board was constituted in the first instance as a temporary and experimental body.

The objects indicated by Lord Cranworth as those at which the Board should aim appear to have been—

- (1) The revision of the Statute Book by the expurgation of defunct Acts; and
- (2) The consolidation of statutes in actual operation.

It soon became apparent that there was great divergence of opinion between the members of the Board as to their mode and order of proceeding. Mr. Chisholm Anstey was in favour of beginning with expurgation. Mr. Bellenden Ker was in favour of beginning with consolidation, and doubted the expediency or practicability of what would now be called Statute Law Revision Bills.

The Board presented three reports, in August, 1853, January, 1854, and May, 1854¹. The first report consisted mainly of papers by the sub-commissioners. Mr. Coode had prepared some papers on consolidation which, though somewhat lengthy and pedantic, contained useful practical suggestions. Messrs. Anstey and Rogers submitted a classification of existing statutes and an expurgatory list of defunct statutes. Mr. Brickdale submitted some specimens of various forms of digest, taking as his subject the law of distress.

In a second report, Mr. Ker argued at much length against the policy of what is now called statute law revision. 'So far from its being,' he said, 'any part of the duty of the legislature to pass a declaratory statute as to expired and defunct Acts, such a measure would at best be nugatory, and perhaps mischievous. Besides,' he argued, 'such a statute, with its thousands of entries, would be impossible to pass.' What he recommended was the preparation of a number of Consolidation Bills.

In his third report he maintained the same line of argu-

¹ *Parliamentary Papers*, 1854, xxiv. 154, 363, 407.

ment, and expressed his opinion that the most useful employment for a permanent Statute Law Board would be:—

- (1) The gradual consolidation or rewriting of the statute law ;
- (2) Preparing or settling Bills for the Government and such other parties as should choose to apply for them, and reporting on Bills referred to them ;
- (3) Watching Bills in their progress through the two Houses, and reporting on alterations which might appear to make the enactments inconsistent with themselves or with other branches of the law.

Appended to this report were papers by Mr. Anstey, Mr. Brickdale, and Mr. Rogers. Mr. Anstey argued strongly in favour of a general expurgatory Bill as a natural preliminary to the work of consolidating the statute law. He also submitted drafts of Bills to consolidate the enactments relating to the National Debt and the Consolidated Fund (as parts of a general Statute of Finance), of Bills to consolidate enactments relating to certain public officers and to public salaries and pensions, and of a Bill for the interpretation of enactments.

Mr. Brickdale submitted, as specimens of the mode of rewriting the statute law recommended by Mr. Ker, drafts of Bills concerning wills and apportionment. He also submitted a paper containing considerations on the propriety of extending the principles of the Consolidated Clauses Acts, interpretation clauses, and similar expedients for obtaining brevity or uniformity in Acts of Parliament.

Mr. Rogers submitted the draft of a proposed 'Labour Act,' to consolidate the enactments relating to employers and workmen.

On August 29, 1854, the temporary Statute Law Board was superseded by a Statute Law Commission consisting of Lord Cranworth (Chancellor), Lord Lyndhurst, Lord Brougham, Lord Wrottesley, Lord Campbell (Lord Chief

Statute
Law Com-
mission of
1854.

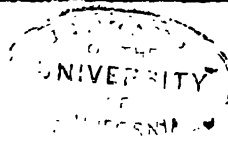
CH. IV. Justice), Sir John Jervis (C.J. of C.P.), Sir F. Pollock (Chief Baron), Baron Parke, Mr. Moncrieff (Lord Advocate), Mr. Spencer Walpole, Mr. Joseph Napier, Vice-Chancellor Page Wood, Sir A. Cockburn (Attorney-General), Sir R. Bethell (Solicitor-General), Mr. Brewster (Attorney-General for Ireland), Mr. Keogh (Solicitor-General for Ireland), Mr. James Crawford (Solicitor-General for Scotland), and Mr. Bellenden Ker. Mr. Walter Coulson, Lord Wensleydale, Sir Fitzroy Kelly¹, and others were subsequently added to the Commission. Mr. Bellenden Ker was the only paid member of this Commission. Mr. Brickdale was the Secretary.

The Commissioners of 1854 presented four reports, in August, 1854, in March, 1856, in June, 1857, and in February, 1859². In their first report they stated that a number of Consolidation Bills, more or less complete, had been prepared under their direction, and they submitted some general considerations on the subject of consolidation. They concluded their report by observing, with respect to current legislation, that 'perhaps nothing satisfactory towards the improvement of future legislation can be effected until either a board or some other persons are appointed, whose duty it shall be either to prepare or revise and report upon all Bills before they are brought into Parliament, and to watch them during their progress through the two Houses, either as officers of the Lord Chancellor or of some other Minister, or as officers of the two Houses of Parliament.'

The second report recommended the adoption of two plans:—

¹ In 1856 Sir Fitzroy Kelly, on introducing a Consolidation Bill which had been prepared under the directions of this Commission, offered to superintend a consolidation of the whole Statute Book, and expressed an opinion that the work might be accomplished in two years. Sir A. Cockburn and Sir R. Bethell questioned his authority to speak on behalf of the Commission, and expressed dissent from his views. Hansard, 141, p. 1084.

² See *Parliamentary Papers*, 1855, xv. 829; 1856, xviii. 861; 1857, xxi. 203; Session 2, xii. 211 1859, Session 2, xiii, part i, 1.



(1) The appointment of an officer or board to revise and improve current legislation; and

(2) The adaptation of a system of classification to the public general statutes.

In the third report the Commissioners stated that they had given instructions for the preparation of a classification of statutes and a register of statutes showing how far each statute was in force.

The fourth report stated that the register and classification had been completed from the time of the union with Ireland to the end of the session of 1858. The Commissioners also said that they thought it probable, from the data furnished by the register, that the whole of the existing statute law might be usefully consolidated into 300 or 400 statutes; that they had already before them upwards of 90 consolidating Bills prepared under their direction, but that as these had been prepared before the register had been completed some of them might require further consideration. They added that the time in which the whole work might be completed must depend on the number of draftsmen employed, but assuming, as their experience enabled them to do, that ten or twelve gentlemen might be constantly employed, they thought it fair to anticipate that the whole of the work might be completed in about two years. And if at the end of that time they were able to present to Her Majesty the whole of the statutes coming under the class of general laws, filling only about three volumes, but comprising all or nearly all of the statutes of a general nature now scattered through forty volumes, they ventured to think that their labours would not be wholly useless. This appears to have been the last report of the Commissioners, and there is no further record of their labours.

The first Statute Law Revision Act, that of 1856 (19 & 20 Vict. c. 64), was based on the recommendations of the Commissioners of 1854. This measure, which during its progress through Parliament was known as the Sleeping Statutes Bill,

Statute Law Revision Act of 1856.

CH. IV. passed through the House of Commons without comment, and very little was said about it in the House of Lords¹. The Act repealed 120 obsolete statutes.

Select
Com-
mittee of
1857.

In 1857 a Select Committee was appointed to consider so much of the second report of the Commissioners of 1854 as related to the proposition therein made for the adoption of means to improve the manner and language of current legislation. The Committee took evidence from Messrs. Coulson, Richards, Ker, and Coode, but their proceedings were interrupted by the dissolution of Parliament before they had time to make a report.

Criticisms
in Parlia-
ment on
proceed-
ings of
Statute
Law
Commis-
sioners.

Considerable dissatisfaction was expressed from time to time in Parliament and elsewhere at the small amount of work accomplished by the successive Statute Law Commissions as compared with the large amount of public money which they had expended. Mr. Locke King made himself the principal mouthpiece of this dissatisfaction². He was of opinion that the Committee of 1853 and the Commission of 1854 had proceeded in the wrong order, and he agreed with Mr. Anstey in thinking that the Commission ought to have begun with statute law revision, and have left consolidation for a later stage. He declared that not less than £35,000 had been expended by the Commission of 1833, and that not a single Bill had been drawn by it; that the Commission of 1845 had spent an additional sum of £12,500, making a total of £47,500 expended by the two bodies, besides a further sum of £1,680 spent on drafting sundry Bills. Then came the Board of 1853 and the Commission of 1854, which, according to him, were equally costly and equally barren. He accordingly moved for an address praying Her Majesty to dispense with the Statute Law Commissioners. The motion was not assented to by the Government, but Lord John Russell admitted that Mr. Locke King had very good grounds for asking what was the use of the Commission.

¹ Hans., 142, p. 1895.

² Hans., 146, p. 774 (July 2, 1857).

On the eve of the dissolution which took place in April, 1859, Sir Fitzroy Kelly, then Attorney-General, introduced a series of Bills to consolidate the criminal law which had been prepared under the direction of the Statute Law Commission. CH. IV
—
Proceedings in
1859.

Soon after the beginning of the next session Mr. Whiteside moved for leave to re-introduce these Bills, and a debate ensued in which the Attorney-General (Sir Richard Bethell), Sir Fitzroy Kelly, and others took part. Sir Fitzroy Kelly said that 'a plan had been proposed to the Commission which had been to a considerable extent acted upon, and in accordance with which ninety-three Bills were then ready, or nearly ready, which would consolidate the whole of the criminal statute law, the whole of the mercantile statute law, and the whole of the real property statute law.' Sir Richard Bethell expressed doubts as to the expediency of longer continuing the Commission¹.

On July 18 of the same year, Lord Cranworth, when presenting Bills for consolidating the law relating to marriages, registration, bills of exchange, executors and administrators, and aliens, called attention to the fourth report of the Commission, and recapitulated the work which it had done since its appointment by him in 1854. He recommended that some barrister of eminence should be placed at the head of it, and thought that the statutes might be consolidated in two years. But Lord Campbell, who was then Lord Chancellor, declined to continue the existence of the Commission².

The Register of Public General Acts, which had been prepared under the direction of the Commission by Mr. Archer, Mr. F. S. Reilly, and Mr. A. J. Wood, was published in pursuance of an order of the House of Lords dated July 5, 1859. It consists of two volumes, and extends from 1800 to the end of 1858. Publica-
tion of
Register
of Public
General
Acts.

On February 17, 1860, Sir Richard Bethell, then Attorney-General, told the House of Commons that he had engaged Steps
taken by

¹ Hans., 154, p. 483.

² Hans., 154, p. 1370.

CH. IV. two gentlemen to work on the obsolete Acts; that he intended to expurgate the Statute Book of all Acts which, though not expressly repealed, were not actually in force; and that he proposed to work backwards from the present time. When the expurgation was accomplished an edition of the actual living law would be published, arranged under appropriate heads. The gentlemen so engaged were Mr. Reilly (afterwards Sir Francis Reilly, K.C.M.G.) and Mr. A. J. Wood¹.

Sir
Richard
Bethell
in 1860.

Statute
Law Re-
vision Act
of 1861.

The measure for statute law revision prepared by Messrs. Reilly and Wood was introduced in 1861 by Lord Campbell, as Lord Chancellor, and became law as the Statute Law Revision Act of that year (24 & 25 Vict. c. 101). It was framed on the basis of the Register of Statutes to which reference has previously been made. The Bill was criticized by Lord Chelmsford and others as involving an undue delegation of legislative powers to the draftsman², and in the House of Commons was made an occasion for proposing the repeal of the Ecclesiastical Titles Act³. But, on the whole, it seems to have passed both Houses without material difficulty. It cleared away 900 obsolete Acts belonging to the period between 1770 and 1853.

Criminal
Law Con-
solidation
Acts of
1861.

In the same year, 1861, were passed the seven Criminal Law Consolidation Acts (24 & 25 Vict. cc. 94-100), which had been prepared mainly by Mr. Greaves, on the basis of the reports of the Statute Law Commissioners of 1833 and 1849.

Statute
Law Re-
vision Act
of 1863.

In 1863 Lord Westbury, as Lord Chancellor, introduced the Statute Law Revision Bill of that year (which, like the Bill of 1861, was framed by Messrs. Reilly and Wood), and took the opportunity of making a notable speech, in which he reviewed the history of previous attempts for the improvement of the statute law, and explained the principles on which the Bill of 1863 was framed⁴. 'What he proposed,' he said, 'was that the Statute Book should be revised and

¹ Hans., 156, p. 1238.

² Hans., 164, p. 1795.

³ Hans., 161, p. 1057.

⁴ Hans., 171, p. 775.

expurgated—weeding away all those enactments that are no longer in force, and arranging and classifying what is left under proper heads, bringing the dispersed statutes together, eliminating jarring and discordant provisions, and thus getting a harmonious whole instead of a chaos of inconsistent and contradictory enactments.’ He explained that, with this object, the whole of the statute roll from 20 Edward III down to nearly the end of the eighteenth century had been examined and revised. ‘The statutes that were weeded out might,’ he said, ‘be described as those which are no longer applicable to the modern state of society, enactments which have become wholly obsolete, enactments which have been repealed by obscure or indirect processes, but which until extirpated from the Statute Book would be constantly the cause of uncertainty. An endeavour had been made to apply a remedy to this state of things. The task was one of great difficulty and delicacy. The reason for every alteration would be found in the schedule given opposite to the description of the enactment to which it had been applied. This had been done in order that the work might be accomplished with something like that certainty and assurance of safety with which works of the kind ought always to be accompanied. When the Statute Book had been cleared of superfluous and unnecessary matter by the process which he described, he hoped to prepare a digest¹ of the whole law, both common and statute.’

In the House of Commons the Bill of 1863 was taken charge of by Sir Roundell Palmer, then Solicitor-General.

¹ With this view a Royal Commission was issued in the autumn of 1866 to Lords Cranworth, Westbury, and Cairns, Sir T. P. Wilde, Mr. Lowe, Vice-Chancellor Wood, Sir George Bower, Sir R. Palmer, Sir John Shaw Lefevre, Sir T. E. May, Mr. Daniel, Mr. Thring, and Mr. Reilly, to ‘inquire into the expediency of a digest of law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions.’ The Commission issued their first and only report on May 13, 1867. They employed certain barristers to prepare specimen digests, but the specimens prepared were not considered satisfactory, and no further steps were taken to continue the work.

CH. IV. It met with a good deal of opposition, principally from Mr. Pope Hennessy and Mr. Ayrton, but was warmly supported by Sir Hugh Cairns, who remarked 'that he believed that the whole effect of the scheme, of which this Bill was a part, would be to reduce the Statute Book from forty-three to somewhere about eight volumes, and that for his own part he could not conceive a more desirable operation. The framers of the Bill deserved the confidence of the House. They were remarkable for accuracy and intelligence, and it was highly to their credit that, whereas about £50,000 had been expended on Statute Law Commissions, the work which led to the Act passed in 1861 and to the compilation of the Bill of 1863 had been done for £3,000 or £4,000¹.

The Bill of 1863 became law as the Statute Law Revision Act of that year (26 & 27 Vict. c. 125) and expurgated the Statute Book from the twentieth year of Henry the Third to the first year of James the Second. It has been taken as the model of all subsequent Statute Law Revision Acts, and in particular contains the elaborate and extensive saving clause embodied in each of those Acts².

Other ex-
purgatory
Acts.

In some cases it was found that numerous enactments might be repealed, although they did not come within the narrow lines laid down for the Statute Law Revision Acts. For instance, the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 45), and the Summary Jurisdiction (Repeal) Act of 1884 (47 & 48 Vict. c. 43), were introduced by the Government of the day as Bills containing substantive enactments, and although consisting almost entirely of repeals, they repealed laws which might possibly operate although substantially superseded by recent enactments. Another instance is supplied by the Statute Law Revision and Civil Procedure Acts of 1881 and 1883 (44 & 45 Vict. c. 59; 46 & 47 Vict. c. 49).

¹ Hansard, 172, p. 1207.

² Each Statute Law Revision Bill contains a note explanatory of the terms used in it to express the reasons for repealing the enactments contained in it, namely 'expired,' 'spent,' 'repealed in general terms,' 'virtually repealed,' 'superseded,' and 'obsoleta.'

In 1867 Lord Cairns, then Lord Justice, submitted to Lord Chancellor Chelmsford a confidential memorandum, suggesting the desirability of an Index to the Statutes, and of a Chronological Table of the Statutes, 'with a column showing also which had been repealed and by what Acts, and showing also subsequent Acts containing important amendments and alterations of such as are not repealed.' The memorandum suggested that the works should be revised throughout after each session of Parliament, and should be made and kept up under the authority of the Houses of Parliament, and that the edition for each year should be brought out as soon after the end of the session as the alterations in the print could be made¹.

CH. IV.
Preparation of Index to and Chronological Table of Statutes.

Lord Chelmsford referred the memorandum and other matters relating to the form and mode of publication of the statutes to Sir John Shaw Lefevre, Sir T. Erskine May, Mr. Thring, and Mr. Reilly², requesting their opinion as to the best means of carrying out the suggestions in it. Their report, dated May 3, 1867, expressed concurrence with Lord Cairns' memorandum. They especially appreciated the advantages which would result from the index and table being kept up regularly and circulated at the end of each session, and considered that the works should be sent yearly to the judges, magistrates, and others. They further made proposals as to framing of the index and chronological table, referring particularly to Mr. Wood's work on the statutes, and to the materials in his possession³.

Lord Chancellor Chelmsford, on May 28, 1867, in intro-

¹ The memorandum had annexed to it specimens of the proposed Index and Chronological Table. The Index was suggested by a paper written by Mr. Thring in 1863, and brought to the attention of Lord Cairns by Mr. Reilly, who appears to have assisted Lord Cairns in the preparation of the memorandum.

² Sir J. Shaw Lefevre was Clerk of the Parliaments, Sir T. E. May was Clerk of the House of Commons, Mr. Thring (afterwards Lord Thring) was Counsel to the Home Office.

³ The report also made recommendations for improving the classification of the statutes. See above, pp. 26, 49, and below, p. 64.

CH. IV. ducing the Statute Law Revision Bill of that year, explained to the House of Lords the views of the Government on these matters, and on October 29, 1867, wrote to the Home Secretary, stating that Sir John Shaw Lefevre and his colleagues had reported that Mr. Wood would prepare the Chronological Table, and that Mr. H. Jenkyns¹ had agreed to undertake the compilation of the Index to the Statutes under the superintendence of Mr. Wood, and also under the supervision of Sir John Shaw Lefevre and his colleagues².

Alteration in classification and editions of the statutes.

The report of Sir John Shaw Lefevre and his colleagues, after showing that the statutes were published in six different forms, all printed by the Queen's Printers, made recommendations as to the editions which should be published, and also recommended :—

- (1) That each Act should be printed and issued separately in an octavo form ;
- (2) That at the commencement of each Act an arrangement of clauses should be prefixed, and that this arrangement and the marginal notes should be carefully revised by competent authority ;
- (3) That the Acts confirming Provisional Orders, or relating to particular harbours or other works which are for various reasons passed as public Bills, should be classed with the local and personal Acts ;
- (4) That a classified list of Acts should be placed at the beginning of each volume of the statutes of the year, in addition to a chronological list, and also two tables showing the effect of the year's legislation.

The alteration in the classification of statutes suggested by this report was carried into effect in 1868, when the existing classification was adopted³.

Appointment of Statute Law Committee in 1868.

In 1868 Sir J. Shaw Lefevre submitted a memorandum to the Lord Chancellor (Lord Cairns), suggesting that the final

¹ Afterwards Sir Henry Jenkyns, K.C.B., Parliamentary Counsel to the Treasury.

² See *Parl. Papers*, 1870, No. 116.

³ See above, p. 26.

step should be taken to give the public the full benefit of the work of statute law revision by the preparation and publication of an edition of the statutes containing those Acts only which are in force¹. Lord Cairns forwarded the memorandum to the Home Secretary approving of the suggestion, and requesting him to move the Treasury to make the necessary arrangements, and said, that if the Treasury concurred, he proposed to entrust the superintendence of the preparation and publication of the edition to Sir J. Shaw Lefevre, and the other gentlemen associated with him in the superintendence of the Chronological Table and Index to the Statutes, and to add to them Mr. Rickards, the Speaker's counsel, who had for some time past acted as editor of the current volume of Acts of Parliament on behalf of the Queen's Printers¹.

On July 9, 1868, Lord Chancellor Cairns wrote a letter to Sir John Shaw Lefevre, saying that he had under consideration the subject of a revised edition of the statutes, a work the expediency of which had been three times affirmed by Parliament in the preambles of the Statute Law Revision Acts. Those Acts had removed any difficulties which would have obstructed the application of the Statute Book to the process of expurgation. He had therefore, with the concurrence of the Treasury, determined that an edition of the statutes should be prepared and published, containing, as far as might be, only such Acts as were in force. He proposed to nominate a committee to make the necessary arrangements and to superintend the execution of the work². The first committee consisted of the gentlemen named above. In this manner was formed the committee which, under the name of the Statute Law Committee, has continued to the present time to superintend Statute Law Revision and sundry matters connected with the statutes, and also the publication of the Chronological Table and Index and the new edition of the statutes.

¹ *Parl. Papers*, 1870, No. 116, p. 10.

² This letter is printed at the beginning of vol. i. of the first edition of the *Statutes Revised*.

CH. IV. The members of the committee are unpaid, and they employ as their secretary an officer of the House of Lords. The Lord Chancellor, who is represented on the committee by his permanent secretary, may be regarded as the official mouth-piece of the committee in Parliament.

Publica-
tion of
Chrono-
logical
Table and
Index to
Statutes.

In January, 1870, was published the first edition of the Chronological Table and Index of the Statutes, brought down to the end of the session of 1869. The Table was framed by Mr. A. J. Wood principally from materials connected with the work of Statute Law Revision. The Index was framed by Mr. Henry Jenkyns, with the assistance of Mr. C. W. Chute, and was based on an independent study of the statutes themselves, with some help from the Index to the Record Edition of the Statutes down to the end of Queen Anne¹.

Publica-
tion of
first edi-
tion of
Revised
Statutes.

The first volume of the Revised Edition of the Statutes was published in the same year, 1870², and the edition was completed in accordance with the original design in August, 1878, by the publication of the fifteenth volume, comprising the statutes of the year 1868, which was the last year to which the revision had been carried.

Arrange-
ment for
extension
of first
Revised
Edition.

In 1878 arrangements were made for continuing the expurgation of the statutes by means of Statute Law Revision Bills for ten years more, namely to the end of the session of 1878, and for the publication of the Revised Statutes for the same period³. Under these circumstances were produced three volumes comprising the statutes from 1868 to 1878. The last of these volumes was published in 1885.

Success-
ive edi-
tions of
Chrono-
logical
Table and
Index.

Editions of the Chronological Table and Index of the Statutes have been periodically published, under the successive editorships of Mr. W. L. Selfe, Mr. G. A. R. FitzGerald,

¹ *Parl. Papers*, 1870, No. 116.

² As to its form see *Parl. Papers*, 1870, No. 116, p. 16. The first volume was edited by Mr. A. J. Wood. The subsequent volumes were edited by Mr. (afterwards Sir G.) Rickards. The Statute Law Revision Bills for the period were prepared by Mr. A. J. Wood.

³ The Statute Law Revision Bills were framed as before by Mr. A. J. Wood, but the editing of the volumes was entrusted to Mr. G. A. R. FitzGerald. *Parl. Papers*, 1877, No. 288.

and Mr. Pulling. In 1877 Sir H. Thring, the Parliamentary Counsel to the Treasury, drew up instructions for the improvement of the Index, and several barristers were employed to revise and recast different titles in accordance with those instructions. The Chronological Table, as originally framed, contained only entries against each Act of subsequent Acts which repealed any portion of it. The Table has, in successive editions, been improved by adding entries which show, with reference to each Act, the particular portions repealed, and also the subsequent amending or applying Acts.

In 1869 an important step was taken towards the improvement of the form of current legislation by the establishment of the office of Parliamentary Counsel to the Treasury¹. Mr. Thring (now Lord Thring), who was then Parliamentary Counsel to the Home Office, was appointed to fill the new post, and Mr. Henry Jenkyns, who succeeded him on his retirement in 1886, was appointed his assistant.

In 1875 a Select Committee of the House of Commons was appointed to consider whether any and what means could be adopted to improve the manner and language of current legislation. The committee referred to the Revised Edition of the Statutes and the Chronological Table and Index which had been prepared under the supervision of the Statute Law Committee, and to the better style of drafting which had been recently introduced in Acts of Parliament, as well with regard to the arrangement of the clauses and the subdivision of the Bill into distinct parts, as also with regard to the language used, which, in simplicity and clearness, was far superior to the 'verbose and obscure' language of former enactments. The objections which might still be charged against the style and structure of public Acts of Parliament would, they said, be found to arise from four causes:—

- (1) From the mode in which the Bill is itself prepared and the extent to which it varies or deals with previous statutes;

¹ See below, p. 84.

CH. IV.

- (2) From the uncertainty which often arises from inconsistent and ill-considered amendments ;
- (3) From the want of consolidation where groups of statutes on similar subjects are left in a state of perplexity ;
- (4) From the absence of any better classification of statutes.

They then referred to the establishment of the Parliamentary Counsel's Office, and to the system under which the work of that office was conducted, and said that, assuming that this system was maintained, there was reason to believe that most of the objections to current legislation in the four particulars above adverted to might be met and obviated. They suggested certain minor amendments, such as the preparation of model clauses, the framing of a general Act on the principle of the Act known as Lord Brougham's Act¹, and certain modifications in the procedure in Committee. As to consolidation, the conclusions at which they arrived were :—

- (1) That, as a general rule, it is unadvisable to attempt consolidation where the law is still in a state of flux ;
- (2) That amendments in the existing statutes should either precede consolidation, or be included in the Consolidating Bill in different type ;
- (3) That where all the clauses of a Consolidation Bill cannot be got through before the prorogation, the Bill should be suspended to the ensuing session, and taken up at the point which it had reached in the previous session.

They thought it would be well worthy of consideration whether in any future edition of the Revised Statutes some classification of the statutes should not be adopted.

It should be stated here that the credit for 'the better style of drafting' referred to by the Select Committee of 1875 is

Improve-
ment in
drafting
of Bills.

¹ 13 & 14 Vict. c. 21. Effect has been given to this suggestion by the passing of the Interpretation Act, 1889.

due mainly to Lord Thring. In 1854, when drafting the Merchant Shipping Act of that year, he introduced the modern plan of breaking up an Act into parts, and sections into subordinate paragraphs or sub-sections. His 'Instructions to Draftsmen,' which were published as a pamphlet by the Stationery Office in 1877¹, have been very generally followed, and have tended materially to improve the style and arrangement of statutes.

Soon after the Judicature Acts came into operation, the Statute Law Committee took into consideration the question how far previous enactments were superseded by them or might be superseded by rules of court made under them. Accordingly they instructed Mr. Arthur Wilson² to prepare a report on the subject, and in 1878 he submitted to the committee a report on the statutes relating to civil procedure and courts³. The work begun by him was afterwards continued by Mr. Chalmers⁴ and the present writer, and resulted in the passing of the Statute Law Revision and Civil Procedure Acts of 1881 and 1883, and in the framing of a large number of rules of court which took the place of previous enactments relating to procedure.

Reports on civil procedure and courts.

In 1877 Mr. R. S. (now Mr. Justice) Wright, in pursuance of a request from the Statute Law Committee, submitted a valuable report⁵ on the statutes relating to criminal law and procedure, and a scheme for their consolidation and simplification. But further progress on the lines thus suggested was stopped by the introduction of the Criminal Code Bill prepared about the same time by Sir James Stephen.

Mr. Wright's report, 1877, on criminal law and procedure.

In 1878 Sir John Holker, as Attorney-General, introduced a Bill for codifying the criminal law and procedure, which

Criminal Code Bills of 1878-83.

¹ Under the title *Practical Legislation; or, the Composition and Language of Acts of Parliament*. This pamphlet is now out of print.

² Afterwards Judge of the High Court of Calcutta, and now Legal Adviser to the India Office.

³ *Parl. Papers*, 1878, lxiii.

⁴ Now Assistant Parliamentary Counsel to the Treasury.

⁵ House of Lords, 178, 1878.

CH. IV.

had been prepared by Sir James Stephen¹. The Bill was read a second time², and withdrawn. It was then referred to a Royal Commission consisting of Mr. Justice Blackburn, Mr. Justice Lush, Mr. Justice Barry, and Sir James Stephen, with Mr. Cowie as secretary³. The Bill as revised by the commission was reintroduced by Sir John Holker on April 3, 1879⁴, but after having been read a second time, on May 5⁵, was withdrawn on July 14. It was reintroduced at the beginning of the session of 1880, and was read a second time and referred to a Select Committee⁶. But further proceedings on the Bill were stopped by the dissolution of Parliament. In 1883 Sir Henry James, as Attorney-General, reintroduced so much of the Bill of 1880 as related to procedure. This Bill was read a second time on April 12, 1883⁷, after a good deal of opposition, and was referred to the Standing Committee on Law, where its progress was finally stopped after discussion of some of the earlier clauses⁸.

Second
edition of
Revised
Statutes.

In 1886 the Statute Law Committee took steps for bringing out a second and cheaper edition of the Revised Statutes, of which the first volume was published in 1888⁹.

Statute
Law Re-
vision
Bills of
1887 and
1888.

The Statute Law Revision Bills introduced and passed in 1887 and 1888 were framed for the purpose of enabling this new edition to be brought out. In considering the revision of the statutes with reference to this new edition it was found that many pages of space might be saved by omitting portions of titles and also enacting words (Be it enacted, &c.). The Bill of 1888 went further than the previous Acts, in so far as it omitted these unnecessary words, but in other respects it followed the principles previously adopted.

¹ Hans., 239, p. 1936 (May 14, 1878).

² Hans., 240, p. 1671 (June 17, 1878).

³ Hans., 241, p. 950.

⁴ Hans., 245, p. 310.

⁵ Hans., 245, p. 1750.

⁶ Hans., 250, p. 1236.

⁷ Hans., 278, p. 90.

⁸ See below, p. 128.

⁹ See above, p. 24. The first three volumes were edited by Mr. G. A. R. FitzGerald, the subsequent volumes by Mr. Albert Gray and Mr. Theobald.

The Interpretation Act, 1889 (52 & 53 Vict. c. 63), CH. IV.
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Interpre-
tation
Act, 1889. generalized several definitions which had been of frequent occurrence in Acts of Parliament. It also laid down certain general rules of construction. It thus tended to shorten and make more uniform the language of enactments. So far as it was retrospective it enabled the Statute Law Revision Bills to strike out of former Acts numerous definitions, and also various expressions, such as 'the Commissioners of Her Majesty's' before the word 'Treasury' and the words 'heirs and successors' after reference to the Sovereign.

All the Statute Law Revision Bills which were introduced between 1863 and 1889 passed both Houses of Parliament without any opposition. But the Bill introduced in 1889 was opposed on the ground that enactments of the present reign ought not to be repealed without the authority of a Select Committee of the House of Commons, and was dropped in the last week of the session. The Bill had been framed on the same lines as the Act of 1888, except that it also repealed certain expressions made unnecessary by the passing of the Interpretation Act, 1889. Statute
Law
Revision
Bill of
1889.

The Bill was reintroduced in the session of 1890, and on reaching the House of Commons was referred to a Select Committee, who in their report said that 'they desire to express their sense of the great caution and accuracy with which the Bill has been prepared, and their opinion that the Statute Law Committee and its assistants have fully justified the confidence which has been shown in them by both Houses of Parliament.' Select
Com-
mittee of
1890.

'In examining the statutes in order to consider the verbal amendments proposed, your committee came to the conclusion that the process of revision might be safely made much more extensive and valuable by the repeal of such of the preambles of these Acts as, having regard to the provisions of the third section of this Bill, were not required for the purpose of explaining or interpreting the Acts to which they were prefixed, and were not of any such historical interest and

CH. IV. importance as to make it desirable that they should be reprinted in future and revised editions of the statutes.’

Statute
Law Re-
vision
Acts of
1890.

The report of the Select Committee of the House of Commons was adopted by the House of Lords after careful consideration of the subject by some of the leading legal members, and a consultation with the Statute Law Committee, with the result that the two Statute Law Revision Acts of 1890 were framed so as to authorize, not the repeal, but the omission from future editions, of certain preambles, and the addition of words indicating where necessary the character of the preamble.

Statute
Law Re-
vision
Act of
1891.

A further Statute Law Revision Bill, framed on the same principles as the preceding Acts, was introduced and passed in 1891, but the second reading was opposed, and the opposition was only withdrawn on the First Lord of the Treasury undertaking that the later portions of the Bill should be dropped, and that the subject of statute law revision should be considered by a Joint Committee in the ensuing session. The Bill was referred to a Select Committee, who reported to the House the whole Bill, including the later portions, and ultimately the whole Bill was allowed to pass.

Establish-
ment of
Joint
Com-
mittee
for con-
sideration
of Statute
Law Re-
vision
Bills.
Recent
Consoli-
dation
Acts.

It was, however, thought prudent to strengthen the guarantees for accuracy in Statute Law Revision Bills by arranging that every Bill of this kind should be referred to a special Joint Committee of the two Houses of Parliament. This procedure was first adopted in the year 1892.

Numerous Consolidation Acts have been passed in recent years, especially since the establishment of the Statute Law Committee in 1868, and of the office of the Parliamentary Counsel to the Treasury in 1869. Most of them were initiated by the Statute Law Committee, who have from time to time submitted to the Lord Chancellor memoranda on the subject of consolidation¹, and were prepared either in

¹ Some of these have been published as Parliamentary papers. See e.g. *Parl. Papers*, 1875, 157; 1877 (House of Lords) 117; 1878 (House of Lords) 19, (House of Commons) 45.

the office of the Parliamentary Counsel, or by draftsmen acting under instructions from, and on the responsibility of that office. Since the establishment of the office, opportunity has frequently been taken, on any amendment of the law, to consolidate various enactments relating to that particular branch of law. For example, on an amendment of the Naturalization Acts in 1870, all the previous Acts were consolidated. So again, in 1869, the enactments relating to the borrowing by the Metropolitan Board of Works were consolidated in the Board of Works Loans Act of that year (32 & 33 Vict. c. 102), and a similar course was taken in the case of the Chancery Funds Act of 1872, the Licensing Act, 1872, and the Explosives Act, 1875.

When a Joint Committee of the two Houses was set up for the consideration of Statute Law Revision Bills, it was determined to refer Consolidation Bills to the same Committee, and the results were, on the whole, very successful. The Committee of 1894 examined and passed four Consolidation Bills, three of them of great importance and magnitude, including the gigantic Merchant Shipping Bill, with its seven hundred and forty-eight clauses and twenty-two schedules. The result of their labours was accepted by the two Houses, and the Bills became law, their passage through the House of Commons being much facilitated by a ruling from the chair that amendments of substance are out of order in a measure professing by its title to be mere consolidation. The report of the Committee on the Merchant Shipping Bill explains clearly the principles on which they proceeded. The Committee express an opinion that the Bill 'reproduces the existing enactments with such alterations only as are required for uniformity of expression and adaptation to existing law and practice, and does not embody any substantial amendment of the law.' They state that they had in some instances removed ambiguities, made consequential alterations, corrected obvious mistakes, and struck out obsolete matter. They had heard representatives of the ship owners and seamen, and

Procedure
for pass-
ing Con-
solidation
Bills in
1894.

CH. IV. carefully considered the views expressed by them as to the effect of the consolidating measure on their several interests. In point of fact the Committee performed their duty in the most careful and exhaustive manner. They required every departure from the existing text of the law to be explained and justified, every case in which the removal of an ambiguity or inconsistency seemed desirable to be submitted for express decision.

Difficulties experienced in 1896.

Sundry Consolidation Bills were introduced in 1895, but were all nipped in the bud by the early dissolution of Parliament. The work was resumed in the session of 1896, but the results were disappointing. A measure for consolidating the enactments relating to friendly societies became law, thanks to the active support of the representatives of the principal societies. But another measure which had cost much valuable time and labour was sacrificed to opposition in the House of Commons. The Acts relating to the administration of the Post Office have not been consolidated since 1837. In their present form they constitute a complicated piece of patchwork, representing legislation which extended over the whole of the late reign. A Bill for consolidating these enactments into a single measure of ninety-three sections had been prepared, and was introduced into the House of Lords at the beginning of the session of 1896. After second reading it was referred to the Joint Committee on Consolidation Bills, and there underwent a careful and minute examination. As revised by the committee it was passed by the House of Lords and sent down to the House of Commons; but on its arrival it was dropped, on the ground that the Post Office Acts required amendments of substance, and that no measure of consolidation would be satisfactory which did not embody these amendments. At the end of the session there was no time to argue the matter out, and the Bill had to be dropped, much to the regret of the Lord Chancellor (Lord Halsbury) and of his predecessor in office, Lord Herschell,

both of whom pointed out in forcible language that if Consolidation Bills were to meet with opposition unless they embodied amendments as well as consolidation, all prospects of proceeding with the important work of consolidating the statute law of England had disappeared ¹. CH. IV.

The fears thus expressed have, up to the present time, been unfortunately realized. The Post Office Consolidation Bill was again introduced in 1897, was again passed through the Joint Committee of Lords and Commons, but was again blocked in the House of Commons, on the ground, it is understood, that it was not, as it professed to be, a measure of consolidation; and amid the press of current business no time could be found for discussing and meeting the objections thus raised. Neither the Post Office Bill nor any other measure of consolidation has been submitted to Parliament since 1897. It was doubtless felt that a body like the Joint Committee could not reasonably be asked to spend their time in examining the arid details of a Consolidation Bill if their labours were to be lightly set aside in the House of Commons, without any consideration for their care and good faith. Thus the work of consolidating the contents of the Statute Book, a work which has, under the direction and with the assistance of a succession of eminent Lord Chancellors, been carried on with more or less activity during the last thirty years, has for the present been suspended.

According to modern practice, every Act of Parliament has, for facility of citation, a short title in addition to its formal long title. When a Bill was introduced to amend existing Acts the opportunity was often taken to give short titles to the Acts so amended. The Short Titles Act, 1892, gave short titles to all the more important of the statutes which either were without short titles or had been given short titles by subsequent Acts. The Act proved to be of much use not only in facilitating the reference to statutes, but by

Suspension of work of consolidation.

Short Titles Acts of 1892 and 1896.

¹ See Hansard, July 30, 1896.

CH. IV. reducing the length and cost of legal documents which involve such reference. It has since been supplemented and superseded by the Short Titles Act, 1896 (59 & 60 Vict. c. 14), which gives short titles to all Public General Acts passed since the Union with Scotland and now in force.

Summary
of results.

It will have been seen that the plan for systematic improvement of the statute law initiated by Lord Westbury, with the approval and sanction of Lord Cairns and Lord Selborne, involved a fourfold task—(1) Indexing, (2) Expurgation, (3) Republication, (4) Consolidation. The work of indexing has been placed on a satisfactory footing¹. The work of expurgation and republication has been carried down to a recent date, and is practically complete for the present. The work of consolidation has come to a standstill.

¹ See above, p. 33.

CHAPTER V

PREPARATION OF ACTS

THE earliest Acts of Parliament were drawn by one or more of the king's judges. They were ordinarily based on petitions presented in Parliament for the redress of grievances, and their language would often, but not necessarily, follow the language of those petitions¹. When judicial and legislative functions became more clearly distinguished, and when Parliament, by substituting the system of legislation by Bill for the system of legislation on petition, obtained the right to settle the terms in which a new law was to be framed, and established the principle that a Bill, when once introduced into Parliament, could not be altered except by the authority of Parliament, and that the Act based upon it must follow precisely the terms in which the Bill was passed by the two Houses, the judges ceased to be responsible for the framing of Acts of Parliament.

CH. V.
Preparation of early Acts.

From this time down to a very recent date there is much obscurity about the mode in which Bills intended to become Acts were prepared. Henry VIII was an industrious monarch, and took an active part in the legislation of his reign. On one occasion he 'came in among the burgesses of the parliament, and delivered them a bill, and bade them look upon it, and waye it in conscience, for he would not, he saide, have them passe on it nor on any other thing because his grace giveth in the bill, but they to see yf it be for a common wele to his subjectes, and have an eye thither-

Legislation in the Tudor period.

¹ See *Introd. to Statutes of the Realm*, xxxi, xxxii.

CH. V. wards. And on Wednesday next he will be there agayne to hear their myndes. . . . This saide burges of the Parliamente¹. This description, apparently by an eye-witness, throws an interesting light on the relations of Henry to his Parliament. The measure can be identified as the Act of 1535-6 about Vagabonds (27 Hen. VIII. c. 25), but the passage quoted is clearly insufficient to support Froude's statement that this Act was 'the composition of Henry himself, and the most finished which he has left to us'².

It is probable that the most important Acts of the Tudor period were framed by committees of the Privy Council, such as the committee which was appointed in 1583 'to consider what laws shall be established in this Parliament, and to name men that shall make the books thereof'³.

Share of judges in preparation of Bills after Restoration.

In the period after the Restoration, the judges, who at that time assisted the House of Lords, not only in their judicial but in their legislative business, and habitually attended the sittings of the House for that purpose, appear to have been occasionally employed by the House as draftsmen of Bills or clauses. Sometimes the heads of a Bill were agreed to by the House, and a direction was given either to the judges generally or to particular judges to prepare a Bill. In other cases a judge would attend a Grand Committee of the House as a kind of assessor, and do such drafting work as was required⁴. It is not clear how long this practice continued, but there is an interesting reference to it in a speech delivered by Lord Hardwicke in the House of Lords on the Militia Bill in 1756⁵. 'In old times,' he said, 'almost all the laws which were designed to be public

¹ Letter of Thomas Dorset to the Mayor of Plymouth: *Suppression of the Monasteries* (Camden Society), p. 38.

² Froude, i. 69. See also p. 75: 'Of this expanded statute we have positive evidence, as I said, that Henry was himself the author.'

³ Dasent, *Acts of the Privy Council*, New Series, iv. 398.

⁴ For illustrations of this practice see 14th Report of the *Hist. MSS. Commission*, Appendix, Part vi, Nos. 567, 581, 608, 641, 667, 702; *MSS. of the House of Lords*, New Series, 1693-1695, No. 930.

⁵ Harris, *Life of Lord Hardwicke*, iii. 58.

Acts, and to continue as the standing laws of this Kingdom, were first moved for, drawn up, and passed in this House, where we have the learned judges always attending, and ready to give us their advice and assistance. From their knowledge and experience they must be allowed to be best able to tell whether any grievance complained of proceeds from the non-execution of the laws in being, and whether it be of such a nature as may be redressed by a new law. In the former case, a new law must be always unnecessary, and in the latter it must be ridiculous. And when by the opinion and advice of the judges we find that neither of these is the case, we have their assistance whereby we are enabled to draw up a new law in such a manner as to render it effectual and easy to understand. This is the true reason why in former times we had very few laws passed in Parliament, and very seldom, if any, a posterior law explaining and amending a former.' There might be some difficulty in identifying the golden age of legislation to which Lord Hardwicke thus refers, but the practice which he commends appears to have been continued at intervals until at least the middle of the eighteenth century. For instance, in 1758, on Lord Hardwicke's suggestion, certain petitions on a pending Habeas Corpus Bill were referred to the judges, with instructions to prepare another Bill to be submitted to the House at the commencement of the next session of Parliament¹.

The only surviving trace to be found at the present day of the old practice of referring Bills to be drawn or settled by judges is the Standing Order of the House of Lords under which an Estate Bill, that is to say, a Private Bill for enlarging the powers of dealing with an estate under a particular family settlement, is referred to two judges for their opinion and report².

Some Acts dealing with specially legal topics appear, as Lawyers' might be expected, to have been drawn by eminent lawyers. Acts.

¹ Harris, *Life of Lord Hardwicke*, iii. 164, 166.

² See May, *Parliamentary Practice*, 10th ed., p. 810.

CH. V. Thus, the Statute of Distributions is said to have been 'penned' by a distinguished civilian, Sir Leoline Jenkins, and, at a much later date, the Fines and Recoveries Act and other Acts arising out of the recommendations of the Real Property Law Commissions are known to have been drawn by the great conveyancer Mr. Christie. Many other statutes bear intrinsic evidence of having been the work of conveyancers.

Eigh-
teenth
century
legisla-
tion.

As to the mode in which the copious and ill-expressed legislation of the eighteenth century was prepared, there is little evidence available. Much of it was the work of private members. Administrative measures introduced by a minister of the Crown may presumably have been drawn by some member of his official staff, or by some legal expert attached to, or working for, his department.

Mr. Pitt's
'Parlia-
mentary
Counsel.'

Towards the close of the century William Pitt appears to have made some more definite and permanent arrangements for the preparation of measures for which he was responsible. Mr. William Harrison, who gave evidence before a Select Committee of the House of Commons in 1833¹, described himself as then being Parliamentary Counsel to the Treasury, and said that his first connexion with drawing Acts of Parliament began before the Revolution in France, in consequence of Mr. Pitt intending to take up some very serious measures for the abolition of tithes, and a complete revision of the Poor Laws, and Mr. Lowndes, who then drew the Acts, requesting assistance. It was arranged that Mr. Harrison, who was then a special pleader under the Bar, was to work for nothing in assisting in drawing Acts of Parliament, on the understanding that he was to succeed to the office of Mr. Lowndes when the latter obtained an appointment as chairman of one of the boards. He worked a few years 'very hard' without any salary. The measures of poor law² and tithe were, he says, laid aside in conse-

¹ *Report (1833) on House of Commons' Officers and Fees*, p. 163.

² Mr. Harrison was of course speaking from memory. The Poor Law

quence of the commencement of the French War, and other matters requiring general attention. Mr. Harrison says that he drew the Tax Bills, beside all the Bills connected with raising men for the army and alterations of the militia law, and was unremunerated. When Mr. Lowndes was appointed Chairman to the Board of Taxes (Feb. 1798), Mr. Harrison succeeded him in accordance with the previous understanding. He was called to the Bar in 1800, but shortly afterwards was told by Mr. Perceval that in consequence of the pressure of public business he must not go on circuit. He said that his duties in 1833 were to draw or settle all the Bills that belong to Government in the Department of the Treasury, but that, though only called Parliamentary Counsel to the Treasury, he had drawn Bills for other departments. Thus he had drawn for the Foreign Office Bills for carrying treaties of peace into execution, for erection of Slave Courts abroad, and for other purposes. During the whole of the war he drew all the military Bills for the Colonial Office. He had drawn Militia Bills for the Home Office, and all the Church Bills for the Commissioners, and the Bills for the residence of the clergy, but not Sir R. Peel's Criminal Law Acts, as he was not specially conversant with criminal law. He occasionally drew, but more often settled, Revenue Bills. He was then engaged in drawing 'the Bills relating to the Bank Charter, and the general Banking Bill.' 'I receive the Minute of Instructions from the Chancellor of the Exchequer; I put the Minute into heads, with details for revision and approbation, and then I prepare the Bill; and I attend meetings with the Law Officers, at his house, in consultations, not legal, but official consultations.' 'Bills have come to me from all departments of Government which have not a counsel of their own. They would not send me the Colonial Slavery Bill, for instance: the counsel to the

projects were not wholly laid aside. In 1796 Pitt brought in a Poor Law Bill, which became the subject of severe animadversions by Bentham.

CH. V. office would of course take care of such a Bill¹. Mr. Harrison received a salary of £1,000 a year, which appears from the Treasury papers to have been charged to the grants for salaries and allowances of the officers of the two Houses of Parliament². He also drew £400 a year as Law Clerk to the War Office.

Change in
nature of
minis-
terial re-
sponsi-
bility for
legisla-
tion.

Very little appears to be remembered about Mr. Harrison or his work, and it is probable that in giving evidence he exaggerated the duties and importance of his office. The Acts which he said he drew are not masterpieces of draftsmanship. But his evidence is of interest as illustrating the dawn of the sense of Government responsibility for Parliamentary legislation. It must be borne in mind that the share of the Executive Government in, and their responsibility for, the work of current legislation, has enormously increased during recent years. Many measures which at the present day could not be carried except as Government measures, were, in the last century, and in the earlier part of this century, introduced and carried by private members. Thus, in the history of poor law legislation, 'Gilbert's Act' and 'Hobhouse's Act' were private members' Acts. Sir Charles Wood, talking to Mr. Nassau Senior about the year 1855, is reported to have said³, 'When I was first in Parliament, twenty-seven years ago, the functions of the Government were chiefly executive. Changes in our laws were proposed by independent members, and carried, not as party questions, by their combined action on both sides. Now, when an independent member brings forward a subject it is not to propose himself a measure, but to call to it the attention of the Government. All the House joins in declaring that the present state of the law is abominable, and in requiring the Government to provide a remedy.

¹ Sir James Fitzjames Stephen tells us how his father, Sir James Stephen, as Under-Secretary for the Colonies, drew the Slave Trade Act, 1824 (5 Geo. IV. c. 113), *History of Criminal Law*, iii. 256. See Leslie Stephen's *Life of Sir James Stephen*, p. 47.

² *Treasury Letter*, September 15, 1835.

³ Mrs. Simpson, *Many Memories of Many People*, p. 223.

As soon as the Government has obeyed, and prepared one, they all oppose it. Our defects as legislators, which is *not* our business, damage us as administrators, which *is* our business.' CH. V.

Mr. Harrison appears to have continued drawing Bills till about 1837, when his office appears to have fallen into abeyance. At the beginning of the present reign, the Home Secretary was ordinarily responsible for initiating the most important legislative measures of the Government, and, as such, felt the need of more regular and systematic assistance in the preparation of Bills. Accordingly, in the year 1837, Mr. Drinkwater Bethune was appointed to a post in which he was charged with the duty of preparing Bills for Parliament under the directions of the Home Secretary. In 1848, Mr. Bethune became member of the Governor-General's Council at Calcutta, and was succeeded by Mr. Coulson, who was instructed to act under the directions of the Home Secretary in preparing Bills originating from any Department of the Government, and in revising and reporting on any Bills brought into either House of Parliament and referred to him by the Home Secretary for that purpose. In 1860, Mr. Coulson was in his turn succeeded by Mr. Henry Thring, now Lord Thring. Mr. Thring appears to have drawn all the most important Cabinet measures of his time; but it was found that as the number of Bills increased, different Departments employed independent counsel to draw their Bills, while other Bills were drawn by Departmental officers without legal aid. The result of this system, or want of system, was far from satisfactory. The cost was great; for barristers employed 'by the job' were entitled to charge fees on the scale customary in private Parliamentary practice. There was no security for uniformity of language, style, or arrangement, in laws which were intended to find their place in a common Statute Book. Nor was there any security for uniformity of principle in measures for which the Government was collectively responsible. Different Departments introduced inconsistent Bills, and there was no adequate means by which the Prime

Appoint-
ment of
Home
Office
Counsel.

CH. V. Minister, or the Cabinet as a whole, could exercise effective control over measures fathered by individual Ministers. And lastly, there was no check on the financial consequences of legislation. There was nothing to prevent any Minister from introducing a Bill which would impose a heavy charge on the Treasury, and upset the Chancellor of the Exchequer's Budget calculations for the year.

Establish-
ment of
Parlia-
mentary
Counsel's
Office in
1869.

In 1869, the acute and frugal mind of Mr. Lowe, then Chancellor of the Exchequer, was much impressed with the defective nature of these arrangements. The remedy which he devised was the establishment of an Office which should be responsible for the preparation of all Government Bills, and which should be subordinate to the Treasury, and thus brought into immediate relation, not only with the Chancellor of the Exchequer, but with the First Lord of the Treasury, who was usually Prime Minister. The Office was constituted by a Treasury Minute dated February 8, 1869¹, and issued when Mr. Gladstone was First Lord of the Treasury and Mr. Lowe (afterwards Lord Sherbrooke) was Chancellor of the Exchequer. Mr. Thring was appointed head of the Office, with the title, revived for that purpose, of Parliamentary Counsel to the Treasury, and was given a permanent assistant, and a Treasury allowance for office expenses and for such outside legal assistance as he might require. The whole of the time of the Parliamentary Counsel and his assistant was to be given to the public, and they were not to engage in private practice. The Parliamentary Counsel was to settle all such Departmental Bills, and draw all such other Government Bills (except Scotch and Irish Bills) as he might be required by the Treasury to settle and draw. The instructions for the preparation of every Bill were to be in writing and sent by the Heads of the Departments to the Parliamentary Counsel

¹ The arrangements made under this Minute were to be in the first instance temporary and provisional, and were not to be made permanent until after two years' experience of their working. They were revised and made permanent by a Treasury Minute of January 31, 1871. There have been some subsequent Minutes making modifications of detail.

through the Treasury, to which latter Department he was to be considered responsible. On the requisition of the Treasury he was to advise on all cases arising on Bills or Acts drawn by him, and to report in special cases referred to him by the Treasury on Bills brought in by private members. It was not to be part of his duty to write memoranda or schemes for Bills, or to attend Parliamentary Committees, unless under instructions from the Treasury.

CH. V.

The object aimed at by Mr. Lowe in 1869 was, according to the Select Committee of 1875¹ 'to establish an official department, at the head of which should be a Parliamentary Counsel of great experience, to whom all the Government Departments in England should have a right to go, so that there should be some person directly responsible for all their Bills if anything went wrong. That responsibility was intended, of course, to be a constructive responsibility rather than the actual responsibility of the Parliamentary Counsel to draw every Bill himself; for in dealing with so vast and multifarious a work as the drawing of Bills for every Department, it would be impracticable for any one man personally to undertake such a task, though he might and ought to be responsible for the draftsmen who were employed by him.'

Object of
scheme of
1869.

The staff of the Parliamentary Counsel's Office still remains practically the same as it was when the Office was first established in 1869. The permanent staff consists of the Parliamentary Counsel and the Assistant Parliamentary Counsel, with three shorthand writers, an office-keeper, and an office-boy, and these together run what may be called the legislative workshop. The amount allowed for payments to members of the Bar, working under the direction and on the responsibility of the Parliamentary Counsel, is usually estimated at an annual sum of £1,500; but this amount is not always expended. Of the barristers employed, two at present attend regularly at the Office, doing such work as may be required of them. But their attendance is purely voluntary; they are

Staff of
Parliamentary
Counsel's
Office.¹ See above, p. 67.

CH. V. under no permanent engagement; they are paid by fees in accordance with the amount of work done by them; and they have their own chambers, and are at liberty to take, and do take, outside work. Such other assistance as is required by the Parliamentary Counsel is given by members of the Bar practising at Lincoln's Inn or the Temple. During recent years, such assistance has been mainly required either for Consolidation Bills or for Bills with respect to which the advice of special experts is desirable.

Gradual abolition of departmental draftsmen.

When the Office was first established, the Departments which had been in the habit of preparing their own Bills through the agency of the salaried legal officers attached to them continued for a time to do so, seeking the aid of the Parliamentary Counsel when necessary. This practice was, however, gradually abandoned, and now all Government Bills, except Scotch and Irish Bills, and subject to a few other unimportant exceptions, are prepared by or under the responsibility of the Parliamentary Counsel's Office¹.

Practice as to instructions for Government Bills.

At the beginning of November, there is usually a meeting of the Cabinet to consider the most important of the legislative measures to be brought forward in the coming session. In order to be ready for these Bills, the Parliamentary Counsel's Office is usually opened on November 1, after having been closed for the Parliamentary recess. He may, of course, have had a previous hint of the subjects likely to engage his attention, in case it should be necessary or convenient to consider them during the recess. Some time in the month of November the Parliamentary Clerk to the Treasury usually sends round a circular to the other Departments, requesting them to inform the Treasury what Depart-

¹ For Scotch and Irish Bills there are separate draftsmen. See below, p. 90. India Office Bills are still usually prepared by the legal adviser to the India Office. The Budget Bill and other Revenue Bills were, until recently, drawn by the officers of the Revenue Departments, but are now drawn in the Parliamentary Counsel's Office. The Appropriation Bill, and a few other Bills of a purely formal character, are still drawn outside the Parliamentary Counsel's Office.

mental Bills are likely to be required. All formal instructions for Government Bills are sent by the Treasury to the Parliamentary Counsel, who is thus placed in the position of being draftsman to the Government, and not to any particular Department. The form of the instructions which he receives is usually as follows:—

CH. V.

TREASURY CHAMBERS,

190 .

Sir,

I am directed by the Lords Commissioners of His Majesty's Treasury to transmit to you herewith a copy of a Letter from the [*Home Office*] dated containing instructions for the preparation of a Bill to

and I am to request that you will place yourself in communication with the [*Home Office*] with a view to drawing the same.

I am,

Sir,

Your obedient Servant,

A. B.

The Parliamentary Counsel.

It will be seen that the instructions thus given are of a general and indefinite character. They may or may not be accompanied by more specific instructions from the Minister or Department principally concerned, in the form either of a short note, or of reference to the report of a Commission or Committee, or of papers showing the circumstances which appear to render legislation expedient. The procedure adopted on receipt of the instructions will vary according to the character and importance of the measure. There will usually be a preliminary conference either with the Minister who is to take charge of the Bill, or with the permanent head of his Department, or with both. In the case of minor Departmental measures, the instructions first received may suffice for the immediate preparation of a draft much in the form in which it will be submitted to Parliament as a Bill. In the

Procedure
on receipt
of instruc-
tions.

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case of more important and elaborate measures, the stage of gestation is naturally longer. It is often necessary to prepare memoranda stating the existing law, tracing the history of previous legislative enactments or proposals, or raising the preliminary questions of principle which have to be settled. The first draft may take the form of a rough 'sketch' or of 'heads of a Bill.' The original draft, whether in the form of a Bill or otherwise, is gradually elaborated after repeated conferences with the Minister, and with those whom he takes into his confidence.

A measure will often affect more than one of the Government Departments; and in those cases the Departments affected will have to be consulted. The responsibility for seeing that this is done rests, primarily, with the initiating Department; but, as a matter of convenience, the necessary communications are often made by the draftsman. In particular, the attention of the Treasury ought to be directed to any legislative proposal involving expenditure of public money; and the Parliamentary Counsel, as an officer of the Treasury, is charged with responsibility for seeing that this duty is not overlooked. When there is a conflict between the views of different Departments on a subject of legislation, the Parliamentary Counsel, from his neutral position, may often find it possible to suggest a mode of harmonizing them. And his general responsibility for all Government Bills enables him to guard against the risk of one Department bringing forward proposals inconsistent with those brought forward by another.

When the draft of a Bill has been finally or approximately settled, it is usually circulated to all the members of the Cabinet for their information before introduction into Parliament; and the Parliamentary Counsel supplies the executive Department concerned with a sufficient number of copies for this circulation.

So long as a Bill remains in the form of a draft, it can be altered and reprinted as often as convenience requires, and

the Parliamentary Counsel employs the services of the King's Printers for this purpose. But as soon as a Bill has been introduced and printed by order of Parliament, it passes out of his control. It can then only be altered by the authority of the House, and copies of the Bill, in its original or its amended form, can only be supplied in the same way as other Parliamentary documents.

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Of course, however, the labours of the draftsman do not end at this stage. The publication of a Bill brings suggestions for amendment, which may be forwarded by the Minister or Department for consideration. After the second reading, these suggestions take the form of amendments on the notice paper, which will have to be daily scrutinized. In anticipation of the Committee stage, the draftsman will often find it prudent to prepare, for the purpose of refreshing his own memory, and for the use of the Minister in charge, notes on the several clauses, explaining the origin and object of the proposals which they embody, referring to the precedents on which reliance can be placed, and noting the arguments which may be used or which may have to be met. As the Committee stage approaches, and when it has been reached, the amendments will be the subject of discussion with the Minister, and alterations or consequential amendments will have to be framed. If the Bill goes to a Committee of the whole House or to one of the Grand Committees, the draftsman may perhaps be expected to attend the debate, and give such assistance as he can in the way of framing or modifying amendments, or meeting points¹.

Work of draftsman after introduction of Bill into Parliament.

Where a Bill is much amended in Committee, it will require minute examination after the Committee stage, for the purpose of seeing whether there are any errors to be corrected, inconsistencies to be removed, or consequential

¹ The arrangements of the House of Commons are not conveniently adapted for this purpose, as the seat usually occupied by the Parliamentary Counsel, and other permanent officials, is at the opposite end of the House to the Treasury Bench. The arrangements in Grand Committee are more convenient.

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alterations to be made; and amendments will have to be framed for insertion at a later stage. Notes will also have to be written on various points; and the literature which thus gathers round a Bill often attains to formidable dimensions. When a Bill of great importance is in progress, it requires the constant and unremitting attention of the Parliamentary Counsel, to the exclusion of all other work. At such times, he is compelled to delegate to the Assistant Parliamentary Counsel, with such other assistance as he can obtain, the responsibility for all Government Bills of minor importance.

Scotch
and Irish
Bills.

Under the Minute of 1869, Scotch and Irish Bills are excepted from the Government Bills for which the Parliamentary Counsel's Office is responsible. At present, Scotch Bills are drawn, as a rule, by the Secretary to the Lord Advocate, ordinary Irish Bills by the draftsman attached to the Irish Office. But all the more important Irish Bills, such as the Irish Church Bill of 1869, the several Irish Land Bills, the Prevention of Crimes Bill, the Government of Ireland Bill of 1886, and the Local Government (Ireland) Bills of 1892 and 1898, have been drawn in the Office of the Parliamentary Counsel. Their complexity, and the important political and financial questions raised by them, made the adoption of this course necessary. Bills affecting the Board of Works in Ireland are usually drawn or settled in the Parliamentary Counsel's Office, because the Board are Treasury officers. In the case of English Bills applying to Scotland or Ireland, or both, the practice is to draw them in the Office of the Parliamentary Counsel, and to attach to them 'application clauses' which are left in blank, and of which the details are filled in by the Scotch or Irish draftsman. The Scotch and Irish draftsmen attend in London during the session, but at other times remain at Edinburgh or Dublin.

Private
members'
Bills.

The Minute of 1869 directed that the Parliamentary Counsel should report in special cases referred to him by the Treasury on Bills brought in by private members. But at

present, except in the case of such references, the Parliamentary Counsel is in no way responsible for the preparation or criticism of such Bills. The special instructions are usually given in cases where the Government, being favourably inclined to the principle of a private member's Bill, promises to facilitate its passing on condition of his accepting the Government amendments.

No systematic supervision is exercised over private members' Bills. The Home Office was at one time supposed to exercise some kind of general supervision over them, but under the existing practice does not criticize any Bills except those relating to Home Office subjects. Each Government Department is in the habit of watching Bills specially affecting matters with which the Department is concerned, and this departmental criticism frequently stops the progress of mischievous Bills, or requires the insertion in them of necessary amendments. It is also the duty of the Parliamentary Clerk of the Treasury to call the attention of Departments to Bills affecting them. And, finally, the Government often rely on the advice of the law officers of the Crown in considering whether any opposition should be offered to private members' Bills. In practice, most private members' Bills are, for some reason or other, 'blocked' at some stage of their progress by some private member, and consequently there is much practical difficulty in getting a private member's Bill through, except by general consent. But it may happen, under existing arrangements, that a Bill, bad in substance or in form, or in both, slips through Parliament because it is not the duty or interest of any one in particular to stop or improve it.

The only class of local and personal, or as they are commonly called, private Bills, with which the Parliamentary Counsel is concerned, are Government Hybrid Bills, that is to say, Bills introduced in the same manner as public general Bills, but being of the same character as ordinary local Bills¹. The

¹ See above, p. 29.

CH. V. instructions for such Bills (which are few in number) are sent to the Office of the Parliamentary Counsel, but he always hands them over to some barrister conversant with private Bill legislation, and is only responsible for providing a competent draftsman, though he is sometimes requested by a Minister to exercise supervision over a particular Bill of this kind.

Private
Bills.

With ordinary private Bills the Parliamentary Counsel has nothing to do, beyond advising occasionally on the form which should be assumed by a clause to protect the interests of the Treasury, or of some other public Department or public interest. Private Bills are watched by the Chairmen of the General Committees of the House of Lords and the House of Commons, with the assistance of their respective counsel and of the officers of the House. It is their duty to see that Standing Orders are complied with, that the Bills correspond more or less closely to the model Bills which have been prepared under their instructions, do not infringe general principles of legislation, and are not unjust or otherwise objectionable. The necessity of considering whether a private Bill infringes general principles of legislation indicates one point at which private touches public legislation. There is another. Where special provisions are of constant recurrence in private Acts, it is desirable that they should be generalized by a public Act, and made to apply to all future cases, either directly or by the machinery of incorporation in the special Act. The most notable instance of legislation of the latter class is supplied by the Clauses Consolidation Acts of 1845, which were prepared by Mr. Booth of the Board of Trade, and which tended greatly to the brevity and uniformity of local Acts. Further steps in the same direction have been taken by the Public Health Act, 1890, and the Electric Lighting (Clauses) Act, 1899; and legislation of this kind might usefully be extended.

Pro-
visional
Order
Bills.

Provisional Order Bills, though introduced by a Minister of the Crown on behalf of his Department, belong essentially

to the class of private Bills. A Provisional Order Bill is usually of a merely formal character. The substantial part is contained in the Orders which the Bill confirms. Those Orders are made by a Department after a local inquiry by their own officers, or after negotiations with the promoters and opponents. The Departments making them have officers who are familiar with the work, and who are accustomed to attend the committees on these Orders, and on Bills bearing on the same subjects as the Orders¹. Of course, as in the case of private Bills, steps may be taken with advantage towards generalizing the provisions, and giving more uniformity to the language and arrangement, of the Provisional Orders².

The main duties of the Parliamentary Counsel relate to current Parliamentary legislation. There are, however, three other classes of duties with which he is concerned :—

Other duties of Parliamentary Counsel's Office.

- (1) Advising on questions affecting Parliamentary legislation ;
- (2) Subordinate legislation, i. e. Orders in Council and Statutory Rules ;
- (3) Statute Law Revision and Consolidation Bills.

The Parliamentary Counsel is required by the Minute of 1869 to advise on all cases arising on Bills or Acts drawn by him. The amount of work falling under this head is indefinite, and its tendency is to increase. It is difficult to define or restrict the classes of cases which are, or may be, connected with legislation, past, pending, or prospective. In such cases it is sometimes convenient for the Government to take the

Advising on questions affecting legislation.

¹ Instructions for the preparation of Orders authorizing the acquisition of land under the Military Lands Act, 1892, and of the necessary confirming Bills, are usually sent to the Parliamentary Counsel's Office, and are dealt with like instructions for Hybrid Bills. But with ordinary Provisional Orders, such as those which are made in great numbers by the Local Government Board and the Board of Trade, the Parliamentary Counsel has nothing to do.

² The Electric Lighting (Clauses) Act, 1899, has fixed the form to be adopted, subject to necessary variations, by Electric Lighting Orders under the Acts which relate to Electric Lighting.

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advice of the Parliamentary Counsel instead of consulting the Law Officers of the Crown; and the Parliamentary Counsel can often, from his knowledge of the history and intention of an enactment, give a clue to its true construction. For this reason, even where questions are referred to the Law Officers, the case for their opinion has frequently to be settled by, and preliminary questions have to be discussed with, the Parliamentary Counsel.

Statutory
rules and
orders.

Under the Minute of 1869, it is part of the duty of the Parliamentary Counsel to draw or settle all such Orders in Council as he may be instructed to draw or settle on special occasions. This is an exceptional, and not a general, duty, and the great bulk of Orders in Council are drawn outside the Office, by or under the instructions of the Departments by which they are initiated. Most of the statutory rules are drawn in the same way. But where an Order in Council or a set of statutory rules is of exceptional importance or difficulty, it is sometimes drawn in the office of the Parliamentary Counsel. For instance, the code of rules under the Army Act of 1881, which was part of the great scheme of consolidating the Mutiny Acts and the Articles of War, was drawn in that office, and probably could not have been drawn elsewhere. It is so important that rules framed under an Act should be framed on the same lines as the Act itself, and it is so difficult to frame those rules properly without being intimately conversant with the provisions of the Act and the objects aimed at by it, that the Parliamentary Counsel not unfrequently finds himself involved in some kind of indirect responsibility for the proper framing of rules or orders under Acts drawn by him. Among recent instances of Orders and rules so drawn are the Orders in Council of 1888 and 1889, relating to the registration of voters. The rules under the Irish Land Act of 1891, the Order in Council under the Marriage Act of the same year, and the difficult and complicated Orders in Council under the Local Government (Ireland) Act, 1898, were also drawn in this manner. Banking

Charters, and Orders in Council, ordinances, and proclamations relating to currency in the United Kingdom and the Colonies, have also been frequently drawn in the Parliamentary Counsel's office. The work of subordinate legislation has, however, always been regarded as extraneous to the ordinary duties of the office, and has usually been done in what would otherwise be leisure time.

Considerable progress has been made during the last thirty years with the work of indexing the statute law, repealing obsolete enactments, and consolidating scattered enactments. This work has been mainly done at the instance and on the responsibility of the Statute Law Committee¹. But the Parliamentary Counsel has always been a member of that committee, and the consolidation work recommended by it, and to some extent the indexing and repeal, have been done by draftsmen working under his instructions. In fact, the task of indexing, expurgating, and rearranging the Statute Book has for many years practically constituted a second charge on the time of his office, and has occupied all the time that could be spared from attending to current legislation, and advising on questions connected with that legislation. Owing to recent difficulties, the work of consolidation has practically come to a standstill for the present; but there is no doubt that it ought to be resumed and carried on in a systematic manner.

The objects aimed at by Mr. Lowe, when he established the Parliamentary Counsel's office in 1869, appear to have been:—

- (1) Economy;
- (2) Better control over Government legislation with respect both to policy and to finance; and
- (3) Improvement of the form of statutes.

All these objects have been substantially attained.

Under the old system, special fees on the scale of those paid to members of the Parliamentary Bar were paid to draftsmen for the preparation of Government measures, and often

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Statute
law re-
vision
and con-
solidation.

Results of
establish-
ment of
Parlia-
mentary
Counsel's
Office.

Economy.

¹ See p. 65.

CH. V. — amounted to very large sums. Under the new system, the payment of such fees has practically ceased. The permanent staff of the Parliamentary Counsel's office has drawn all Government Bills with the assistance of a few outside counsel, employed and paid under the responsibility of the office. Notwithstanding the growth of Parliamentary legislation since 1869, the cost of drafting Government Bills has been reduced since that date.

Control over Government legislation.

The control exercised by the Treasury and the Prime Minister has also been made more effectual. As instructions for all departmental Bills must come through the Treasury, it is no longer possible for the head of a department to initiate legislation without the knowledge or consent of the First Lord of the Treasury and the Chancellor of the Exchequer, one of whom is nearly always Leader of the House of Commons, nor to initiate without the knowledge of the Treasury legislation involving the expenditure of public money.

Improvement in form of statutes.

Perhaps the chief advantage which has arisen from the institution of the Parliamentary Counsel's office has been an improvement in the form of statutes. Acts of Parliament will always form the subject of adverse comments by the Bench, the Bar, and the public. But if the Statute Book of the present day is compared with the Statute Book of forty or fifty years ago, it is impossible to deny that the language of statutes has become more concise, uniform, and accurate, and that the arrangement of statutes has become more logical and consistent. The Select Committee of 1875 on Acts of Parliament expressly referred to 'the better style of drafting which has been recently introduced into Acts of Parliament, as well with regard to the arrangement of clauses and the subdivision of the Bill into distinct parts, as also with regard to the language used, which, in simplicity and clearness, is far superior to the "verbose and obscure language" of former enactments.'

Suggestions for

Suggestions have been made from time to time for enlarging the duties of the Parliamentary Counsel's office in

the direction of systematizing the work of consolidation, extending central control over the preparation of Orders in Council and statutory rules, and supplying assistance for, or exercising control over, the preparation of Bills introduced by private members. But most of these suggestions raise difficult administrative questions, and the adoption of any of them would involve an increase in the staff and expense of the office, and some further restriction on the personal responsibility of its head.

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extension
of duties
of Office.

CHAPTER VI

PASSAGE OF BILLS THROUGH PARLIAMENT ¹

CH. VI. **RIGHT OF INITIATING LEGISLATION.** THE right of initiating legislation belongs to every member of Parliament ². Any member of either House can introduce a Bill, and no distinction is made in this respect between members of the Executive Government and other members of the House ³. The number of Bills introduced each session by private members largely exceeds the number of Bills introduced on behalf of the Government. But a private member's Bill has usually much less chance of becoming law ⁴. This is owing to the arrangements made for the business of the House. The normal arrangements are these. In the early part of each session, precedence is given to Government business on Mondays, Thursdays, and Fridays, Fridays being usually appropriated to Supply. Tuesdays are reserved for the discussion of motions of which private members have given notice, and Wednesdays are set apart for the discussion of private members' Bills, in the order in which they appear on the notice paper. As the session advances, the Government sometimes appropriate the whole time of the House for the discussion of a Bill of special importance, and towards the end of the session the Government, after a 'massacre of the inno-

¹ For further information on the subject of this chapter, reference must be made to May's *Parliamentary Practice*, to Sir William Anson's *Law and Custom of the Constitution*, Part II, 'Parliament'; and, with respect to private Bills, to Clifford's *History of Private Bill Legislation*. The chapter relates only to public Bills, and to such points of procedure as the draftsman of a Bill has to bear in mind.

² But the introduction of a Bill touching the prerogative or the interests of the Crown requires the consent or recommendation of the Crown.

³ As to the right of initiating legislation in France and Germany, see Note A at the end of this chapter.

⁴ See below, p. 215.

cents,' that is to say, after abandoning measures which it despairs of being able to pass, takes the whole time of the House for its legislative and other business. Therefore the chance of a private member being able to pass a Bill depends on one of two things. He must either, by the chance of the ballot, obtain a first place for his Bill on some Wednesday at a reasonably early part of the session; or he must so avoid or neutralize opposition to his Bill that it can pass through its several stages as an unopposed measure after the conclusion of the business which involves discussion.

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The mode of introduction¹ of a public Bill differs in the House of Lords and the House of Commons.

Mode of introduction.

In the House of Lords a Bill is presented by any peer without notice, and is thereupon immediately read a first time. The usual practice is to present the Bill in a complete shape, so that it may be circulated to the peers immediately. But sometimes a Bill is presented in 'dummy,' and the circulation of the Bill is delayed and alterations are made in it after the dummy has been presented.

In the House of Commons a public Bill can be only introduced on motion after notice given.

If the Bill is a Money Bill, i. e. a Bill of which the main object is to grant money, it must originate in a Committee of the whole House². Notice must be given for the House to go into Committee for the purpose of originating the Bill. A resolution is then passed in Committee that it is expedient to grant the money, and to make such legislative provisions as are required for the purpose of the Bill. This resolution is framed by the officers of the House in the Public Bill Office after seeing the proposed Bill; and care must be taken that the terms of the resolution are sufficiently wide to cover the whole of the Bill.

¹ As to legislative procedure in the American Congress, see Bryce's *American Commonwealth*, Part I, ch. xvi; as to legislative procedure in France, see Note B at the end of this chapter.

² See Standing Order, 58.

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Where a Bill is not a Money Bill, but any clause of the Bill involves a grant of public money, a resolution authorizing the grant must be passed by a Committee of the whole House, and adopted by the House on report before the House deals with the clause in Committee, and the Committee may be appointed and resolution moved at any time after second reading of the Bill.

Where, therefore, a Bill authorizes the grant of public money, it should be considered whether this is its main object or merely a subsidiary object.

It must also be borne in mind that, under Standing Order 57, the House will not proceed on any motion for a grant or charge on the public revenue, whether payable out of the Consolidated Fund, or out of moneys provided by Parliament, unless recommended by the Crown.

If a Bill is not a Money Bill, a notice of motion is given for leave to introduce it. This notice specifies the full title of the Bill, preceded by a short title for entry on the Orders of the Day.

This short title is printed on the top of every page of the Bill, and is the name by which the Bill is entered in all proceedings of the House, but it need not be the same as the short title which, by the practice of the House of Lords, is now required to be enacted in the body of every Bill.

When a member, on his motion, is ordered to bring in the Bill, he must present it. He obtains, usually from the Public Bill Office, a piece of paper called a 'dummy,' which he then presents, and the Bill is read a first time. The real Bill is afterwards handed to the officers of the House, either at the Table or at the Public Bill Office, for circulation. The Bill must be circulated in sufficient time before the date for its second reading; but not unfrequently some days or even weeks elapse between the introduction of the Bill and its circulation to the House.

Until a Bill is circulated, any change can be made in it which is not at variance either with the title or with any

statement respecting the Bill made by the member upon its introduction. CH. VI.

When a Bill is once circulated, no change can be made in it except by way of amendment in Committee, but if a mistake is discovered the order for the second reading of the Bill can be discharged and a new Bill introduced and circulated immediately.

Italic headings and marginal notes do not form part of a Bill, and can at any time be altered by the officers of the House¹. Where a clause is altered in its passage through the House, care should be taken to make such consequential alterations of the marginal notes as are necessary.

The officers of the House are responsible for the printing in italics of those portions of the Bill which have to be so printed, and for the proper printing on the back of the Bill of the names of the members by whom it is 'backed.'

In the House of Commons the first stage in the progress of a public Bill is motion for leave to introduce. If leave is granted the House orders that the Bill be prepared and brought in by the mover and seconder, other names being sometimes added by the House. The Bill may then be immediately presented. The questions, 'That the Bill be now read a first time,' and, 'That it be printed,' are put without amendment and debate, and an order is then made that it be read a second time on a day named. Stages in progress of Bill.

The second reading of a Bill is the stage at which the principle of the Bill ought to be discussed. An opponent may either move 'that the Bill be read a second time that day six [or three] months,' which shelves it for the session, or may meet the motion with a direct negative, which shelves it for a day, or may move, by way of amendment, resolutions which affirm an object or a principle contradictory to the purposes of the Bill.

If the Bill is read a second time it may be referred either

¹ See *A. G. v. G. E. Railway Co.* (1879), 11 Ch. D. 460, and *Sutton v. Sutton* (1882), 22 Ch. D. at p. 513.

CH. VI. to a Committee of the whole House or to one of the Standing Committees which are now usually appointed for each session, or to a Select Committee.

Where it is desired to introduce numerous amendments into a Bill it is sometimes convenient to move that it be committed *pro forma*, in which case it can be reprinted with the necessary amendments, and discussed in Committee in its amended form.

On the motion to refer a Bill to a Committee, an instruction to the Committee may be moved for the purpose of extending the scope of the Bill. This practice has been recently restricted by rulings of the Speaker.

On May 5, 1893, the Speaker laid down the following rulings with reference to the instructions moved on the Government of Ireland Bill:—

‘The principles which guide a limit in the system of instructions on going into Committee may be thus stated:—First, an instruction must empower the Committee to do something which the Committee is not otherwise empowered to do. Secondly, the purpose of the instruction must be supplementary and ancillary to the purpose of the Bill, and must fall within the general scope and framework of the Bill. Thirdly, it is irregular to introduce into a Bill, by an instruction to the Committee, a subject which should properly form the substance of a distinct measure, having regard to usage and the general practice of enacting distinct statutes for distinct branches of law.’

Under Standing Order 35 of the House of Commons, in Committee on a Bill the preamble is to stand postponed until after the consideration of the clauses, without question put.

In Committee, the clauses are discussed in the order in which they stand in the Bill, unless it is moved and resolved to postpone a clause or group of clauses.

The amendments on each clause are discussed in consecutive order with reference to the parts of the clause to which they relate. When the Committee have agreed that particular words do or do not stand part of the clause, they cannot go back from this decision at the Committee stage.

New clauses are introduced and discussed after the con-

sideration of the Bill, as referred to the Committee, has been concluded. Ca. VI.

When the discussion in Committee is finished, the Bill is reported to the House with the amendments made, and the next stage is the consideration of report. At this stage new clauses, of which notice stands on the notice paper, are brought up for discussion before amendments on existing clauses. Under Standing Order 41 of the House of Commons, no amendment may be proposed on the report stage which could not have been proposed in Committee without an instruction from the House.

After the report stage, a motion may be made to recommit the Bill, either generally or with reference to a particular provision. A motion of this kind is sometimes made when it is desired to introduce a financial provision which could not have been introduced at the report stage. But motions to recommit are, for obvious reasons, not encouraged.

Where it is desired to make exhaustive alterations in a Bill, the Bill is sometimes committed *pro forma*, in order that it may be reprinted, with a view to its discussion in the altered form.

The next stage is the third reading. Under Standing Order 42, no amendments, not being merely verbal, are to be made to any Bill on the third reading.

The procedure in the House of Lords differs in some respects from the procedure in the House of Commons. In Committee, new clauses are discussed in the order in which they will stand in the Bill, and their discussion is not postponed until the existing clauses of the Bill have been disposed of. Under recent practice, a Bill, after having gone through a Committee, of the whole House, is referred to a Standing Committee unless this reference is expressly negatived. Greater latitude is allowed for amendments on the report stage and on the motion for third reading. Amendments may also be moved on the motion that the Bill do pass.

Where a Bill originating in one House is amended in the

CH. VI. other House, a motion is made in the originating House, either that the amendments made in the other House be agreed to, or that they be disagreed to, or that they be amended. If the amendments are all agreed to, nothing further happens in Parliament, and the Bill is ripe for the Royal assent. If there is a disagreement or amendment, the Bill goes back to the second House for reconsideration of the points of difference. If the disagreement continues, the originating House appoints a committee to draw up reasons for its disagreement. Formerly there was a conference between the two Houses, but this practice has been discontinued for many years. Under the existing practice, the Bill goes backwards and forwards until an agreement is arrived at, or is found to be impracticable. In the latter case the Bill drops.

Classes of
Com-
mittees.

Reference has been made above to the different classes of committees to which a Bill may be referred.

A Committee of the whole House consists of the House sitting in a less formal manner. The Speaker leaves the chair; his place as chairman is taken by the Chairman of Committees sitting at the table, and the mace is removed from the table.

The existing system of Standing Committees began in 1883. Under the present practice two Standing Committees are appointed during each session, in pursuance of standing orders, for the consideration of such Bills relating to Law and Courts of Justice and Legal Procedure, and to Trade, Shipping, Manufactures, Agriculture, and Fishing, as may be committed to them. These Standing Committees, consisting of not less than sixty nor more than eighty members, are nominated by the Committee of Selection, who are in every case to regard the classes of Bills committed to the Committee, the composition of the House, and the qualifications of the members selected. The Committee of Selection has the power of adding not more than fifteen members to a Standing Committee in respect of any Bill referred to it

to serve on the Committee during the consideration of the Bill, and of discharging members serving on the Committee, and of appointing others in substitution for those discharged.

The Committee of Selection consists of the Chairman of the Standing Orders Committee, and of seven other members nominated by the House at the beginning of every session.

The Chairman of each Standing Committee is appointed from a chairmen's panel nominated by the Committee of Selection. The quorum of a Standing Committee is twenty.

The constitution of Select Committees of the House of Commons is regulated by Standing Orders. The normal number is fifteen, but a larger number may be appointed for special reasons. The mode of appointing the members varies. Sometimes the member in charge of a Bill suggests his committee, and leaves it to be appointed by the House. Not unfrequently the members of the Committee are nominated either wholly or partly by the Committee of Selection. The Select Committee on a hybrid Bill, that is to say, on a Bill which though local in its character is for special reasons introduced as a public measure, is nominated partly by the House and partly by the Committee of Selection. The cases in which it is considered expedient to refer a Bill to a Select Committee instead of a Committee of the whole House or to one of the two Standing Committees are usually cases in which it is desirable to take evidence, and for that purpose to summon witnesses and call for papers. Under these circumstances, reference to a Select Committee usually involves delay.

It will have been seen that a Bill when once introduced into Parliament cannot be altered except by authority of Parliament. When a Bill has finally passed both Houses, the King's Printer sends to the House of Lords two copies of the Bill printed on vellum. These copies, after having been examined by the officers of the House of Lords, are certified by the signature of the Clerk of the Parliaments as accurate copies of the Bill to which both Houses have agreed,

Authenti-
cation of
Acts.

CH. VI. and the Royal assent, when signified, is endorsed upon them. One of the copies is stored in the Victoria tower, and the other is deposited in the Record Office¹.

NOTE A

INITIATION OF LEGISLATION IN FRANCE AND GERMANY

France.

The right of initiating legislation has varied much under the successive constitutions with which France has been endowed during the last hundred years.

The constitution of 1791 gave the representatives of the people the exclusive power of proposing a law. All that was reserved to the king was the power to indicate in each year the subjects which in his opinion ought to be taken into consideration by the Legislature in the course of the session.

Under the constitution of the year III (1794) the Council of Five Hundred had the exclusive privilege of initiating and framing laws. The Directorate could invite the Council to take an object into consideration but could not submit the draft of a law. The *Conseil des Anciens* could not amend measures passed by the Council of Five Hundred. It could only accept or reject them *en bloc*.

The constitution of the year VIII (1799) gave the right of initiating legislation to the Government exclusively. Under this constitution the Council of State was charged with the duty of preparing all laws, and every proposal for a law was supported by some member of that council. Thus the Council of State made all the laws of the First Empire. It acted through a legislative committee (*section de législation*).

Under the Constitution of 1814 the king was to propose all laws, but the Chambers might petition (*supplier*) the king to propose, and might indicate the subject which in their opinion it ought to consider. This right was largely used under the Restoration. The petitions for legislation submitted by the Chambers were drawn up in the form of Bills (*propositions de loi*) and divided into clauses (*articles*).

The Charter of 1830 expressly gave to the Chambers a right of initiating legislation concurrently with the Crown.

¹ As to the ancient practice of engrossing Bills and Acts, see Clifford, *Private Bill Legislation*, pp. 317-322.

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The Revolution of 1848 invested the National Assembly with the full power of initiating laws, but the representatives of the executive authority were authorized to submit projects of law to the Assembly. Under Article 75 of the Constitution of 1848 the Council of State was to be consulted on all legislative proposals emanating from the Government and on all legislative proposals submitted to it by the Assembly. The functions of the Council were more fully defined by the law of March 3, 1849, under which

- i. The Council was to be consulted on all Government legislative proposals, subject to certain exceptions (finance, military matters, treaties, matters of urgency);
- ii. The Council was, at the request of the Assembly, to advise on all legislative proposals, whether proceeding from the Government or not;
- iii. The Council was to prepare all Government Bills, and advise, at the request of the Government, on all other Bills.

The Constitution of 1852 took away the right of initiating legislation from the Assembly and vested it exclusively in the Executive. Under this Constitution the Council of State played a very important part. It superseded the ministers in the task of preparing Bills and practically superseded the Assembly in the task of examining them. It was to draw up all *projets de loi*, and no amendment suggested by a commission of the legislative body could be adopted until it had received the approval of the Council.

A decree of Feb. 3, 1861, slightly enlarged the powers of the so-called legislative body by enabling its commission to appoint three delegates to explain its reasons before the Council of State. Thus practically the assembly remained under the tutelage of the Council in matters of legislation throughout the Second Empire.

All this disappeared with the Third Republic, which closely clipped the wings of the Council of State. Under the organic law of May 24, 1872, the Council is to advise on any Government Bill submitted to it by the Government and on any other *proposition d'initiative parlementaire* submitted to it by either of the two Houses. But there is no obligation to consult the Council, and the form and progress of a measure is in no way dependent on its approval. The Council of State still has a legislative committee (*section de législation*).

Many attempts have been made to give the Council of State a more active part in the preparation of laws, but they have all been found incompatible with the principles involved in the constitution of the Third Republic¹.

¹ See Pierre, *Traité de Droit Politique*, 59-61, 78-82. Dupriez, *Les Ministres*, &c., ii. 399-415.

Germany.

CH. VI. In the German empire the Reichstag has theoretically the right of initiating legislation, but by far the larger part of the statutes which it passes are prepared and first discussed by the Bundesrath. They are then sent to the Reichstag, and, if passed by that body, are again submitted to the Bundesrath for approval before they are promulgated by the Emperor¹. In Prussia the Landtag has the right to initiate legislation, but this right is not much used, and the bulk of the Bills that are introduced, and almost all those that are enacted, are proposed by the Government².

NOTE B

LEGISLATIVE PROCEDURE IN FRANCE

The characteristic feature of French legislative procedure is the system of bureaux. The successive stages of an English public Bill, whether introduced by a member of the Government or by a private member, are in the House of Commons as follows: (1) Motion for leave to introduce. (2) Order giving leave, followed immediately by introduction, first reading, and order to print. (3) Second reading. (4) Reference to a committee, which may be either (a) a committee of the whole House, (b) one of the two Standing Committees on Law and Commerce, or (c) a select committee. (5) Consideration in committee. (6) Report by committee to the House. (7) If the Bill has been amended in committee, consideration of report. (8) Third reading. (9) Passing of the Bill. The normal procedure after second reading is reference to a committee of the whole House. When the House resolves itself into committee the Speaker leaves the chair, and his place is taken by the Chairman of Committees sitting at the table. The mace is removed and the procedure is somewhat less formal. In the House of Commons substantial amendments may be made in committee and on the consideration of report, but not at any subsequent stage. In the House of Lords substantial amendments may be made at any stage after second reading. The House of Lords has no standing committees on law and commerce, but after a Bill has passed through committee of the whole House it is ordinarily referred to a standing committee which meets once a week.

The procedure in the French Chamber of Deputies is entirely different. A distinction is drawn between Government Bills,

¹ See Lowell, *Governments and Parties in Continental Europe*, i. 265.

² *Ibid.* i. 299.

which are called *projets*, and private members' Bills, which are called *propositions*. The latter are referred to a *commission d'initiation*, for the purpose of seeing whether they are regular in form. The next stage is reference to the bureaux. At the beginning of each session the Chamber, which consists of 576 members, is divided by lot into 11 bureaux. The four first bureaux have 53 members each, the others 52 each. Each bureau appoints a president and secretary. When a Bill is 'referred to the bureaux' each bureau considers it separately, and then appoints a 'commissary' to represent the views of the bureau. The 'commissaries,' when united, constitute a 'commission' or committee. In ordinary cases each bureau appoints a single commissary; but the committee on the Budget Bill consists of 33 members, three appointed by each bureau. Each committee appoints a president and secretary, the latter being usually the junior member of the committee. They also choose a reporter (*rapporteur*), who is charged with the important duty of formulating the views of the committee and representing them to the House. The committees usually sit twice a week, on Wednesday and Friday. Their sittings are not public; but the promoter of a Bill, if not a member of the commission to which it is referred, has a right of audience. The proceedings begin with a general discussion of the Bill. If the principle is approved, the articles or clauses are considered in detail, and may be amended. The proceedings terminate with the preparation and adoption of a report, which is not a mere formal document, but states fully the arguments for and against the proposals accepted. The report is presented to the House, and forms the basis of subsequent discussions on the Bill. In these discussions the 'reporter,' as representative of the committee, takes the leading part in supporting its conclusions.

It is difficult for a foreigner to know how this procedure works in practice; but two or three points naturally occur to any one familiar with English parliamentary procedure. (1) The details of a Bill are more likely to receive effective examination before a small committee of eleven than in a committee of the whole House. (2) The practice of submitting a reasoned report on each Bill supplies valuable information which we too often considerate in England. (3) The system is exposed to, and probably illustrates, the evils incidental to indirect elections. Each 'commissary' represents the majority of the bureau which appointed him. The report of the committee represents the views of the majority of the 'commissaries'; but it may well be that those views do not reflect, indeed they may materially differ from, the views of the majority of the whole House. (4) The promoter of a Bill, including the Government as promoter of Government measures, retains less control over it than under the English practice. The Finance Minister may see his budget completely transformed by the Budget Committee; and we have often been puzzled in England by the conflict between the views of the

CH. VI. Budget Committee and the views of the Government, and have found a difficulty in reconciling this conflict with the responsibility of the Government for national finance. And, lastly, the spokesman of the measure, as it emerges from the committee, appears to be, not its original promoter, but the reporter of the committee to which it was referred¹.

¹ For a description of the French system see Pierre, *Traité de Droit Politique*. Dupriez, *Les Ministres dans les principaux pays d'Europe et d'Amérique*, ii. 384-386. For some instructive comments on the working of the committee system in French legislation, see Lowell, *Governments and Parties in Continental Europe*, i. 111-117. See also his remarks on the committee system in Italy (p. 207), the German Empire (p. 255), and Prussia (p. 300).

CHAPTER VII

CONSOLIDATION OF STATUTES

THE term 'consolidation,' as applied to statute law, means the combination in a single measure of enactments relating to the same subject-matter, but scattered over different Acts.

CH. VII.
Meaning
of con-
solidation.
Difficul-
ties of con-
solidation.

It will have been seen from the retrospect embodied in Chapter IV, that, while the process of improving the statute law by expurgation of the dead and republication of the living law, after having been carried on actively and continuously for the last five-and-twenty years, is now practically complete, the work of consolidation has, for the time being, come to a standstill. This is far from satisfactory. But it must be borne in mind that consolidation is a much more difficult undertaking than expurgation and republication. There is a common fallacy that the task of consolidating Acts of Parliament is mainly mechanical, and involves little more than the use of paste and scissors. There can be no greater delusion.

In the first place, it must be remembered that our statute law extends over six centuries of the national life, and that every statute speaks with the language and bears the colour of its time. What would be the literary effect of placing in immediate juxtaposition sentences or fragments of sentences from Wyclif, Sir Thomas More, Bacon, Johnson, Macaulay? Or conceive a line of soldiers consisting of the Black Prince's long-bowmen, Cromwell's buff-coated troops, the grenadier of the 'March to Finchley,' and Mr. Thomas Atkins, marching shoulder to shoulder. Such a literary jumble, such a motley

Change of
language.

CH. VII. and ill-assorted array, would be produced by a congeries of extracts from Plantagenet, Tudor, Georgian, and Victorian statutes.

Changes of law and circumstances.

Then, apart from considerations of language, every statute is framed with reference to, and presupposes the existence of, the law, the judicial and administrative institutions, and the social conditions, of its time. During the last fifty years, the leading judicial and administrative institutions of this country, have been completely remodelled. The consolidator who did not carry his work further back than the beginning of Queen Victoria's reign would have to deal with a time when there were no Supreme Court of Judicature, no County Courts, no Local Government Board, no County, District or Parish Councils; when in fact the ordinary machinery referred to and implied in Acts of Parliament was wholly different. Nor can the consolidator afford to overlook the more subtle and elusive effects produced on the operation of a statute by changes in the rules of substantive law, in rules of procedure, or in social conditions.

Differences of style.

Again, enactments relating to the same subject-matter, even when belonging approximately to the same period, are not unfrequently drawn in different styles, and employ, intentionally or deliberately, different phrases to express the same thing; and differences of this kind must be removed if ambiguity and inconsistency are to be avoided.

Ambiguities and obscurities.

Lastly, the comparison and recasting of different enactments are certain to bring to the surface obscurities and inconsistencies, some of which may have been made the subject of judicial or other comment, while others may have lurked unseen. It is difficult to justify the retention and stereotyping of these defects, and at the same time it is difficult to remove them without incurring the charge of altering, while professing to reproduce, the law.

Consolidation means re-writing.

The upshot is that the work of consolidation requires intimate acquaintance with past as well as with existing laws and institutions, involves the rewriting and not merely the

placing together of laws, the substitution of modern for antiquated language and machinery, the harmonizing of inconsistent enactments, and yet the performance of this work in such a way as to effect the minimum of change in expressions which have been made the subject of judicial decisions and on which a long course of practice has been based. The performance of such a task with the degree of accuracy properly required by Parliament requires minute examination and careful deliberation, and imposes a heavy burden, not merely on the draftsman, but on numerous members of the official administrative staff.

And, whilst the preparation of Consolidation Acts is no easy task, their introduction and passage through Parliament is apt to be attended with considerable difficulty. Statute law reform is one of those things which every one praises in the abstract, but about which, in its concrete form, no one is enthusiastic. No minister expects to obtain much credit from passing a measure of consolidation. Such measures are not eagerly demanded by the constituencies, and do not figure as items in any political programme. The permanent official, to whom a minister looks for advice, is often reluctant to alter the form of Acts with which he is familiar, and knows that the preparation of a Consolidation Bill may severely tax the time of himself and his subordinates. Hence a minister is naturally unwilling to introduce such a measure except on an assurance that it will pass unopposed, and will not encroach on the scanty time available for proposals looming more largely in the public eye. And such an assurance cannot always be obtained. It is difficult to disabuse the average member of Parliament of the notion that the introduction of a Consolidation Bill affords a suitable opportunity for proposing amendments, to satisfy him that re-enactment does not mean approval or perpetuation of the existing law, or to convince him that attempts to combine substantial amendment with consolidation almost inevitably spell failure in both.

Consolidation Acts not popular.

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Progress
made in
consoli-
dation.

Yet, notwithstanding these difficulties and obstacles, reasonable progress has been made since 1869 with the consolidation of various branches of the statute law. Among the groups of enactments which have been consolidated may be mentioned those relating to the Coinage, the National Debt, Stamps and Stamp Duties, the Customs, the Management of Taxes, the Slave Trade, Public Health, Weights and Measures, the Militia, Sheriffs, Coroners, Mortmain, County Courts, Commissioners for Oaths, Factors, Lunacy, Foreign Jurisdiction, Foreign Marriages, the Housing of the Working Classes, Municipal Corporations, Public Libraries, Trustees, Copyhold, Diseases of Animals, Merchant Shipping, Friendly Societies. Most of these Acts have been drawn in pursuance of recommendations by the Statute Law Committee, and through the agency of the Parliamentary Counsel's Office. In some cases Parliamentary obstruction has been indirectly of use in suggesting and stimulating improvements in the form of the statute law. Thus the Army Act, which forms a standing code for the discipline of the army, but in accordance with constitutional usage is annually brought into force by a short Continuance Act, owes its origin to the difficulties which were experienced in passing through Parliament the old-fashioned, cumbrous, lengthy Mutiny Acts. Under the new system the annual Continuance Acts embody, in a brief and technical form, such amendments of the law as are from time to time found requisite, and provision is made for periodically reprinting the standing Army Act with these amendments. There are other recent Acts, owing their initiation to the Statute Law Committee, and fashioned in the Parliamentary Counsel's Office, which, though not falling precisely within the category of Consolidation Acts, serve the same useful purpose of shortening and simplifying the form of the statute law. The Interpretation Act of 1889 generalizes a number of definitions and rules of construction which had been in common use, and thus promotes uniformity of language, and supersedes a vast number of special clauses

and provisions. The Short Titles Act of 1892 facilitated the reference to statutes, and has proved to be of much use in reducing the length and cost of legal documents involving such reference. It has now been supplemented and superseded by the Short Titles Act of 1896, which gives short titles to all Public General Acts passed since the Union with Scotland. The Public Authorities Protection Act of 1894 substituted a short general provision for the various and often unsatisfactory devices by which Departments of the Government and other public authorities had previously sought protection against unscrupulous litigants. CH. VII.

But if the amount already accomplished in the direction of consolidation is not despicable, the amount which remains to be done is great indeed, and would suffice to occupy for many years the spare time of the Statute Law Committee, the Parliamentary Counsel's Office, the Government Departments, and Parliament. The numerous groups of Acts which have to be administered by the newly constituted or remodelled local authorities—County Councils, District Councils, Parish Councils, Boards of Guardians—stand in urgent need of simplification. The provisions of the Poor Law are still embodied in a series of Acts beginning with the Statute of Elizabeth and extending over a period of three centuries. The law of Public Health for the country outside London, though consolidated in 1875, has been much amended since, and requires not only consolidation but adaptation to the new machinery through which it is to be administered. The law relating to highways is even more fragmentary and obsolete. Had these and kindred branches of the law been consolidated, the task of framing the recent Local Government Acts would have been infinitely easier, and their form would have been far more satisfactory. But, as is usual in such cases, consolidation waited for amendment and amendment waited for consolidation. The enactments relating to the Supreme Court of Judicature are formidable in number and complication, but most of them could, without serious difficulty, be brought

Work to
be done.

CH. VII. within the compass of a single Act. The law regulating some of the great public Departments, such as the Post Office, is ripe and over-ripe for consolidation. The Acts relating to the Government of India are more than forty in number, and some of them date from before the time of Warren Hastings.

Need of support from public opinion.

What seems to be most needed is the formation of a body of public opinion which will encourage and stimulate the Government of the day in the introduction of Consolidation Bills, and the establishment of a practice under which Parliament will accept and pass them with a reasonable guarantee of their accuracy. The success which until a year or two ago had attended recent experiments in improving the machinery for carrying such measures through Parliament seemed to supply favourable omens for their easier progress in the future. But, as has been seen from what has been said in Chapter IV, the hopes based on that success have been disappointed, and the work of consolidation has for the present been arrested.

This is not a state of things which can be contemplated with satisfaction. Can any remedy be discovered? Two things seem needed—first, such an expression of public opinion as would justify the Ministers of the Crown in undertaking a troublesome task; and secondly, a restoration of Parliamentary confidence in the work done under the authority of the Joint Committee of Lords and Commons.

Is consolidation worth the trouble it involves?

Is consolidation of the statute law worth the trouble that it involves? This is a question which ought to be fairly and squarely met. There are some, including men entitled to speak with high authority, who would say that it is not. Doubtless the existing statutes are numerous, fragmentary, and ill-expressed. But with the expenditure of a reasonable amount of time and with the help of a decent index, it is always possible, they might say, to find what you want in the Statute Book. Consolidation in the form of verbal literal reproduction of existing enactments is, for the reasons

referred to above, impracticable. Consolidation in any other form involves the risk of altering the law in ways not desired or intended by the legislature. New language raises new questions and means new litigation. And then the apparent simplicity of a Consolidation Act is illusory. If a question of construction arises it is often necessary to look beyond the words of the existing Act and to consider the effect of previous enactments. So that the old search is still necessary, and there is added to it the difficulty of becoming familiar with another statute, novel in language and arrangement. This is the kind of answer which might not unnaturally be given by a judge who is accustomed to hear questions of statutory construction argued out by eminent counsel on either side, or by a leading barrister who has through long experience acquired familiarity with the intricacies of the Statute Book or of such part of it as he is most likely to want, who has at his disposal 'devils' for hunting up out-of-the-way points, and who is apt to ignore the fact that the difficult questions with which they have to deal are rare and exceptional, and bear a very small proportion to the number of difficulties removed by consolidation. Whether it is the answer that would be given by the 'unlearned' Member of Parliament who is expected to understand and discuss a Bill intelligible only by reference to a score of scattered enactments, by the busy police magistrate who has to compare half a dozen 'cuffing statutes' before he can decide an apparently simple point, or by the member of or clerk to a local authority who finds that he cannot safely exercise his administrative powers without frequent tedious and costly references to counsel, is another question. It may be assumed that the conscientious legislator, the harried magistrate, and the worried official would prefer consolidation to chaos. Anyhow, if it is considered safer and easier to go on adding a new volume each year to the statutes without taking any steps to reduce the bulk or simplify the contents of the existing mass of statute law, the Government must be content to turn

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CH. VII. a deaf ear to the public officials and private citizens who periodically relieve their feelings by describing the laws of England, in Cromwell's forcible language, as 'a tortuous and ungodly jumble.' They must be content also to hear the amending Bills, which they have to introduce from time to time in order to keep our complicated administrative machinery in gear, described as 'Chinese puzzles.' It is comparatively easy to amend a single Act. But when amendment of the law cannot be effected except by patching up several Acts, 'applying' or 'adapting' several more, and appending, in schedules, lists or fragments of others, the result is apt to be distracting to the legislator, the administrator, and the private citizen. Yet such is the inevitable result of piling Act upon Act without any attempt to weld into shape any part of the chaotic heap. English laws, based as they are on an unrivalled store of legal and administrative experience, ought to supply models to our colonies and to foreign countries. But they are severely handicapped by their defective form. If they were better expressed and better arranged, they would be more readily and advantageously adopted or imitated by colonial legislatures. And if countries like Japan look to France rather than to England for their models in legislation, it is not because the law of France is better in substance, but because it is better and more intelligible in form.

Possible
improvements in
machinery
for con-
solidation.

If it should be deemed discreditable to a great nation to lay aside the task of simplifying the contents of its Statute Book, it may be worth while to consider whether there is not room for improvement in the machinery for effecting that task.

Parliament, and every Member of Parliament, is entitled to a reasonable assurance that what professes to be consolidation deserves that name and does not disguise and conceal alterations in the substance of the law. At the same time it is perfectly clear that Parliament cannot by its ordinary machinery, and through its ordinary committees, test the accuracy of an elaborate measure of consolidation. Some-



body must be trusted to do the work. In whom can this trust be safely reposed? And what guarantees of fidelity and accuracy can reasonably be required? It may be that an assurance by a responsible law officer of the Crown that a measure is 'consolidation pure and simple' would satisfy the House. But what does the phrase 'consolidation pure and simple' imply? It has been said above, and it cannot be repeated too often, that consolidation in the sense of verbal and literal reproduction is impracticable. The law has to be rewritten in modern language. The form must be changed in order that the substance may be retained. Existing statutes contain many provisions which, to use Lord Westbury's language, 'are no longer applicable to the modern state of society' and have been 'repealed by obscure or indirect processes.' Is the recognition of these changes and the adaptation of statutory language in these requirements to be treated as amendment of the law?

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Even when the draftsman has done his work with the most scrupulous care, questions must almost always arise which he is unable to solve, and which demand the exercise of legislative discretion. There will usually be found, as has been remarked elsewhere, '*lacunae* to be filled, obscurities to be removed, inconsistencies to be harmonized, and doubts to be resolved.'

In the case of Consolidation Bills which have come before the Joint Committee of Lords and Commons, the practice has been for the draftsman to state these questions fully in the form of notes, supplemented by such verbal information as may be required, and to leave with the Committee the responsibility of determining how they should be settled. The particular form of solution adopted has not always been the same. In some cases of obscurity or ambiguity it has been considered safer to 'consolidate the doubt.' In others the Committee have felt it to be their duty to save litigation by cutting the knot. When, as often happens, the existing practice is not consistent with the letter of the law, the question usually con-

CH. VII. sidered has been whether the matter related merely to the internal regulations of a Government Department or affected the rights and interests of the outside public. In the former case, common sense seemed to point towards what might be described as the natural and legitimate development of the law and against express revival of regulations which experience had proved to be unnecessary or inconvenient. But where outside rights or interests were concerned, the action of the Committee was strictly conservative, and great jealousy was shown of any suggestion that it might be convenient to smoothe away administrative difficulties by slight alterations to the law. It was always felt that to do this was the proper function of the legislature at large by means of amending measures. Of course there is always room for argument as to where the line should be drawn between 'amendments of the law' or 'alterations necessarily incidental to consolidation,' or 'adaptations to existing law and practice.' But if the work done by the Joint Committees is carefully examined, it will be seen that their tendency has been to take a very strict view as to the limits of their powers.

If any one chooses to say that the procedure thus described is not consolidation, as he understands the term, he is perfectly justified in doing so. Only he must remember that consolidation in the sense which he attaches to the term is not practicable.

The House of Commons usually takes a common-sense view of these questions, and, if its opinion were fairly challenged, it would probably say that it was quite willing to give its Committees a reasonable discretion as to what they did and what they did not think consistent with consolidation, provided always that it had some means of testing the grounds on which the Committee proceeded. Such a means could easily be supplied. In the first place, definite instructions might be laid down as to the principles on which the Committee are to proceed. These instructions would probably correspond more or less to the lines of the report presented

by the Joint Committee who settled the great Merchant Shipping Act of 1894. In the next place, the report presented by the Committee on each Consolidation Bill might be specific instead of general, might deal with each of the questions submitted to the Committee for solution, and might explain the reason for the particular solution adopted. This would involve a certain amount of trouble and delay, but the amount of additional trouble would be trifling as compared with that necessarily involved in the preparation of a Consolidation Bill. CH. VII.

The problem is how to reconcile the control which the House ought to exercise over its Committees with the provision of facilities for passing measures which are not contentious but which may occasionally require a few words of explanation. Perhaps some slight amendment of the Standing Orders might be required. It might be expedient to let measures of this kind be taken on one day in the week either at the time allowed for private Bills or after twelve o'clock. In every case of a Consolidation Bill a very short discussion would suffice to settle the question whether the Committee who had considered a Consolidation Bill had done their work properly or not. The problem does not seem difficult to solve, but until it is solved in some way or other the work of consolidating the statute law must be indefinitely postponed.

CHAPTER VIII

CODIFICATION

CH. VIII.

Ben-
tham's
definition
of codi-
fication.

BENTHAM is responsible for the invention of the word 'codification,' or at all events for its introduction into the English language¹. We are therefore bound to ask what meaning he himself attached to the term. The answer is to be found in his *General View of a Complete Code of Laws*². The object of a code is that every one may consult the law of which he stands in need, in the least possible time³. 'Citizen,' says the legislator, 'what is your condition? Are you a father? Open the chapter "Of Fathers." Are you an agriculturist? Consult the chapter "Of Agriculture."' 'A complete digest, such is the first rule. Whatever is not in the code of laws ought not to be law⁴.' 'The great utility of a code of laws is to cause the debates of lawyers and the bad laws of former times to be forgotten⁵.' Its style should be characterized by force, harmony, and nobleness. 'With this view, the legislator might sprinkle here and there moral sentences, provided they were very short, and in accordance with the subject, and he would not do ill if he were to allow marks of his paternal tenderness to flow down upon his paper, as proof of the benevolence which guides his pen⁶.' 'A code framed upon these principles would not require schools for its explanation, would not require casuists to unravel its subtleties. It would speak a language familiar to everybody; each one might

¹ Murray's *Dictionary*, s.v.

² Published in French by Dumont, 1802, Bowring's edition, vol. iii. p. 157.

³ p. 193.

⁴ p. 205.

⁵ p. 207.

⁶ p. 208.

consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness. The father of a family, without assistance, might take it in his hand and teach it to his children, and give to the precepts of private morality the force and dignity of public morals¹. The code having been prepared, the introduction of all unwritten law should be forbidden. Judges should not make new law. Commentaries, if written, should not be cited. 'If a judge or advocate thinks he sees an error or omission, let him certify his opinion to the Legislature, with the reasons of his opinion and the correction he would propose².' 'Finally, once in a hundred years, let the laws be revised for the sake of changing such terms and expressions as by that time may have become obsolete³.'

In short, the code was to be complete and self-sufficing, and was not to be developed, supplemented or modified except by legislative enactment.

These views were characteristic of the age in which Bentham wrote. It was an age of great ideals. It underrated the difficulties of carrying them into execution. It overrated the powers of government. It broke violently with the past. It was deficient in the sense of the importance of history and of historical knowledge. It aimed at finality, and made insufficient allowance for the operation of natural growth and change. It forgot Bacon's maxim that *subtilitas naturae subtilitatem artis multis partibus superat*. It ignored or underestimated differences caused by race, climate, religion, physical, social and economical conditions.

If Bentham was the chief apostle of codification at the beginning of the present century, Savigny was its chief opponent. His famous work, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, 'On the Vocation of our Time for Codification and Jurisprudence,' was published in 1814 as a counterblast to Thibaut's pamphlet of the same year, *Über die Nothwendigkeit eines allgemeinen bürgerlichen*

Savigny
on codi-
fication.

¹ Gp. cit., p. 209.

² p. 210.

³ Ibid.

CH. VIII. *Rechts für Deutschland*, 'On the Necessity of a General Civil Code for Germany.' Both works were due to the revival of German patriotism, caused by the Napoleonic wars. Thibaut urged his countrymen to promote German unity by codifying and unifying their laws. Savigny warned them against hastily and inconsiderately following foreign models. According to him, Germany did not yet possess either the scientific knowledge or the scientific terminology requisite for codification. Moreover, the models proposed for adoption were marred by serious defects. They had been hastily put together; their authors had only a superficial knowledge of the subjects with which they dealt; they were full of blunders and defects¹. Although Savigny's plea was primarily for delay, yet it is clear that he was opposed to codification on principle. His desire was that law should be gradually developed by the silent internal forces of national consciousness, with the least possible interference by the legislature. He would have abolished the hateful French codes in those parts of Germany into which they had been introduced. Where there were in existence national codes—as in Prussia and Austria—he would not abolish them, but he would, by means of scientific and especially of historical study, bring them back into close organic relation with the common law. Everywhere he would circumscribe the functions of the legislature in the field of private law, and would confine its activity, as far as possible, to the clearing up of doubts and the authoritative declaration of customs².

Results
of Ben-
tham's
work.

Bentham and Savigny were both giants. To each of them half his prayer was granted, whilst the other half has been scattered to the winds.

Bentham is the greatest of English law reformers. He fulminated even more against the practical than against the

¹ Savigny afterwards admitted that his criticisms on French jurisprudence were overcharged. Preface to second edition, 1828.

² See Dr. Behrend's Essay in Holtzendorff's *Encyclopädie der Rechtswissenschaft*.

formal defects of English law, and it is not an exaggeration CH. VIII.
to say that of the changes which have transformed both the
substance and the administration of English law since his
time the majority are due more or less directly to his sugges-
tions. His efforts for improving the form of law have been
less completely realized. 'Bentham,' wrote J. S. Mill in 1838,
'demonstrated the necessity and practicability of codification,
or the conversion of all law into a written and systematically
arranged code.' In truth, he demonstrated neither the one
nor the other. What he did was to set up an ideal towards
which legislation should tend, an ideal which has been
materially modified by subsequent reflection and experience,
but which has profoundly influenced the thought and action
of lawyers and legislators since his time. He has not shown
the necessity, but he has shown the utility, of codification.
By his own unsuccessful experiments, he went far to demon-
strate the impracticability of codification, *in the sense which he
attached to the term*. We no longer believe either in the
practicability or in the desirability of a code which shall be
complete and self-sufficing, which shall absolve from the
necessity of researches into the case law or statute law of
the past, which shall preclude the judicial development of law
in the future, and which shall provide a simple rule applicable
to every case with which the practical man may have to deal.
We know that legal rules and legal expressions cannot be
severed from their roots in the past. We know that enacted
law is most useful if confined to the statement of general
principles, and that the more it descends into details, the more
likely it is to commit blunders, to hamper action, and to cramp
development. We know that the chief practical difficulty of
the lawyer and the judge is not the apprehension of principles,
but the application of principles to facts, and that the best
constructed code cannot remove this difficulty. But we have
also learned, and mainly through Bentham's teaching, that
many of the difficulties of law are due to confusion of thought,
to obscurity of expression, to want of orderly arrangement;

CH. VIII. and the lessons have borne fruit both in our Statute Book and in our legal textbooks.

In one part of the British Empire Bentham has exercised a more direct influence on the form of legislation. James Mill was a devoted disciple of Bentham. He was examiner of Indian correspondence when Macaulay was sent out with instructions to draw up a code or codes for British India; and it is to the pen of James Mill that is attributed by tradition the dispatch in which those instructions were emphasized and developed. Macaulay's Penal Code, after a long slumber in pigeon-holes, and subsequent revision by experts, became law in 1860, and was followed by the other well-known Indian codes. These codes have sometimes been unwisely praised. They are not, and do not profess to be, models of the kind of codes required or suitable for a country like England. But they are excellent examples of the kind of codes suitable for unprofessional judges and magistrates, and they illustrate the mode in which, and the extent to which, Bentham's principles can be applied to practical needs.

Results of
Savigny's
work.

Savigny was the founder of historical jurisprudence. He was the first to insist on, and to illustrate by his writings and research, the importance of the historical treatment of law, and has thereby revolutionized the science of law. His services in this respect, both to his country and to the world at large, have been incalculable. But the practical question raised by the controversy between him and Thibaut has been answered, on the whole, in favour of the latter. Savigny exaggerated the theoretical defects in existing codes, and underrated their practical utility. He ignored Bentham's half-truth that 'he who has been least successful in the composition of a code has conferred an immense benefit.' He pushed too far the familiar argument that codification checks the natural growth of the law and arrests its development. He overrated the ability and willingness of what he called the 'national consciousness,' meaning thereby, practically, the legal profession, to effect legal reforms and adapt law to the

requirements of the day without the assistance or compulsion of the legislature. And lastly, he underrated the forces which were making for codification in Germany. The German people were struggling towards national unity; national unity meant unity of law, and unity of law could not be brought about without codification. The teachings of Savigny and the historical school have given Germans the knowledge and training requisite for the production of a scientific code; their warnings have not deterred Germany from following the path of codification. After many partial codes, the year 1896 gave Germany the general civil code for which Thibaut asked in 1814. CH. VIII.

In Bentham's own country codification has found less favour and made less progress than on the continent of Europe. Fate of
codifica-
tion in
England.

Lord Westbury, when Lord Chancellor, meditated a general digest of English law. With this view a Royal Commission was issued in the autumn of 1866 to Lords Cranworth, Westbury, and Cairns, Sir T. P. Wilde, Mr. Lowe, Vice-Chancellor Wood, Sir George Bowyer, Sir Roundell Palmer, Sir J. Shaw Lefevre, Sir T. E. May, Mr. Daniel, Mr. Thring, and Mr. Reilly 'to inquire into the expediency of a digest of law, and the best mode of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions.' The Commission presented their first and only report on May 13, 1867. They employed certain barristers to prepare specimen digests, but the specimens prepared were not considered satisfactory, and no further steps were taken to continue the work.

In the next decade, Sir James FitzJames Stephen, fresh from his codifying labours in India, where he had passed into law a Criminal Procedure Code, an Evidence Act, and a Contract Act, made vigorous endeavours to adapt his Indian models to English uses. He drew a Bill for codifying the English law of evidence, which was introduced into Parliament, but did not advance beyond a first reading, and has never been published. His draft Code of Criminal Law

CH. VIII. and Procedure was a more ambitious project. After having been introduced into Parliament by Sir John Holker in 1878, it was referred for revision to a Commission consisting of the draftsman and three other judges, who presented their report and draft code in 1879¹. The part of the draft code which related to procedure was introduced as a Government measure in 1882, and was the first subject referred to the Grand Committee on Law which was set up experimentally in that year. After a few sittings, in which small progress was made, the Bill was abandoned. Some of the proposed changes of procedure, which, in disregard of tactical considerations, had been placed in the forefront of the measure, excited parliamentary opposition, and, from the point of view of technical accuracy, other provisions of the Bill were open to criticism. The failure of the measure gave a check to the cause of codification in England. It confirmed the indisposition of Parliament to take codifying measures on trust, even when backed by the highest legal authorities. And it confirmed the doubt of experts whether the kind of codification which had been found suitable for India would also suffice for England. But the drafts have produced results. If Stephen's Criminal Code failed to find a place in the English Statute Book, his digests of English Criminal Law and Criminal Procedure are, and seem likely to remain, the best guides to those subjects which can be obtained either by the English or by the foreign student.

The term codification is sometimes employed loosely so as to include Consolidation of Statutes. But in its stricter and narrower sense it means an orderly and authoritative statement of the leading rules of law on a given subject, whether those rules are to be found in statute law or in common law. Of codifying measures in this narrower sense, three only have up to this date been passed by Parliament: the Partnership Act, 1890 (53 & 54 Vict. c. 39), which was drawn by Sir Frederick

¹ See above, p. 70. The report, which was substantially Stephen's work, presents an able statement of the case for codifying criminal law.

Pollock; the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), both of which were drawn by Mr. Chalmers, afterwards Law Member of the Council of the Governor-General of India¹. A Bill to codify the law of marine insurance, also drawn by Mr. Chalmers, was introduced more than once by Lord Herschell, but has not yet become law. CH. VIII.

As India has been the most successful field of English codification, it seems worth while to trace somewhat fully the methods which have been adopted for carrying out the work of codification in that country, the stages by which it has been advanced, and the results which have been achieved. Codification in India.

The scheme of giving to British India a complete and definite system of law probably originated in a correspondence which took place about 1829 between Sir Charles Metcalfe and the judges of Bengal². It was adopted by Parliament on the renewal of the Indian Charter in 1833. The Charter Act of 1833³ provided for the appointment by the Governor-General in Council of a Law Commission to inquire into the jurisdiction, powers, and rules of the existing courts of justice and police establishments, and into the nature and operation of all laws prevailing in any part of British India; and to make reports thereon, and suggest alterations; due regard being had to the distinction of castes, difference of religion, and the manners and opinions prevailing among different races and in different parts of the said territories.

In pursuance of the powers thus conferred, the first Indian Law Commission was appointed in the year 1834. It consisted originally of Macaulay, who was the first Legislative Councillor, and of three Civil Servants of the Company—one from each Presidency. After about two years this Commission published Macaulay's draft of the Indian Penal Code, which was subsequently revised by Mr. Drinkwater Bethune,

¹ Now Assistant Parliamentary Counsel to the Treasury.

² Whitley Stokes, *Anglo-Indian Codes*, p. 10.

³ 3 & 4 Will. IV. c. 85, s. 53.

CH. VIII. Sir Barnes Peacock and others, and did not become law until 1860, long after the first Indian Law Commission had ceased to exist. The Commission seems to have lost much of its vitality after Macaulay's departure from India. It lingered on for many years, published periodically bulky volumes of reports, but did not succeed in effecting, or in inducing the Government to effect, any measure of codification, and was finally allowed to expire. The last of the Indian Charter Acts, that of 1853¹, refers to the labours of the Commissioners by reciting that they 'have in a series of reports recommended extensive alterations in the judicial establishment, judicial procedure and laws, established and in force in India, and have set forth in detail the provisions which they have proposed to be established by law for giving effect to certain of their recommendations, and such reports have been transmitted from time to time to the Court of Directors, but on the greater part of such reports and recommendations no final decision has been had.'

Accordingly the Act of 1853 provided for the appointment of a new Commission, which was instructed to make a diligent and full inquiry into, and to examine and consider, the recommendations of the previous Commissioners and the enactments proposed by them for the reform of the judicial establishments, judicial procedure and laws of India, and such other matters in relation to the reform of the said judicial establishments, judicial procedure and laws as might, by or with the sanction of the Commissioners for the affairs of India, be referred to them for their consideration.

This second Commission was appointed on November 9, 1853. It consisted of eight members, including Sir John (afterwards Lord) Romilly, Sir John Jervis, Sir Edward Ryan, and Mr. Robert Lowe, afterwards Lord Sherbrooke. At the time of their appointment the intention of amalgamating the Queen's and Company's Courts in the Presidency towns of India (known as the Supreme and Sudder Courts) had

¹ 16 & 17 Vict. c. 95.

already been announced to Parliament, and the Commissioners CH. VIII. were instructed to address themselves, in the first instance, to the consideration of the preliminary measures necessary for this purpose, in particular to the preparation of a simple and uniform code of procedure¹.

The Commissioners sat in London till the middle of 1856 and presented four reports, in which they submitted a plan for the amalgamation of the Supreme and Sudder Courts, and a uniform Code of Civil and Criminal Procedure, applicable both to the High Courts formed by that amalgamation, and to the inferior courts of British India. They also adverted to the wants of India in respect of substantive civil law, and they submitted their views as to the best mode of supplying those wants.

The recommendations of these Commissioners resulted in important legislation both in Parliament and in the Legislative Council of India. Macaulay's Penal Code was taken up and revised, and was passed into law in 1860. A Code of Civil Procedure was passed in 1859 and a Code of Criminal Procedure in 1861. By the Act of Parliament of 1861, 'for establishing High Courts of Judicature in India' (24 & 25 Vict. c. 104), the old Supreme and Sudder Courts at Calcutta, Madras and Bombay were amalgamated into the present Chartered High Courts, and provision was made for establishing another High Court in the North-West Provinces². Thus by 1861 India had acquired a Penal Code and Codes of Civil and Criminal Procedure. The Procedure Codes were doubtless rough and capable of much improvement, but they constituted an enormous advance on the chaotic and incomplete regulations by which they had been preceded.

On December 2, 1861, a third Indian Law Commission was

¹ Letter from Board of Commissioners for affairs of India to India Law Commission, dated November 30, 1853.

² It will be remembered that in the meantime the Government of India had been transferred to the Crown by the Act of 1858 (21 & 22 Vict. c. 106), and the Indian Legislative Councils had been remodelled by an Act of 1861 (24 & 25 Vict. c. 67).

CH. VIII. constituted, consisting in the first instance of Lord Romilly, Sir William Erle, Sir Edward Ryan, Mr. Robert Lowe (Lord Sherbrooke), the late Mr. Justice Willes, and Mr. Macleod. On the retirement of Lord Chief Justice Erle and Mr. Justice Willes their places were taken by Mr. W. M. James (afterwards Lord Justice James) and Mr. John Henderson, and on the death of Mr. Henderson he was succeeded by Mr. Lush, afterwards Lord Justice Lush. The instructions of the Commissioners were to prepare, in accordance with the recommendation of the earlier Commissions, a body of substantive law for India, and to consider such other matters in relation to the reform of the laws of India as might be referred to them by the Secretary of State.

The Commissioners presented their first report on June 23, 1863, and submitted by it a draft law of succession and inheritance applicable to various persons not professing the Hindu or the Mohammedan religion. By this time Sir Henry Maine (then Mr. Maine) had become Law Member of the Governor-General's Council¹, and the Bill framed by the Commissioners was carried through the Council by him, and became law under the title of the Indian Succession Act (Act X of 1865).

By their second report, dated July 8, 1866, the Commissioners submitted rules of law which they had prepared on the subjects of contracts in general, of the sale of movable property, of indemnity and guarantee, of bailments, of agency, and of partnership.

By their third report, dated July 24, 1867, the Commissioners submitted rules of law on the subjects of promissory notes, bills of exchange, and cheques. The fifth² report comprised rules of law on the subject of evidence, and

¹ He took his seat towards the end of 1862, and retired at the end of 1869, being succeeded by Sir James Stephen (then Mr. FitzJames Stephen).

² The fourth report, dated December 18, 1867, was written in answer to the Secretary of State with reference to certain objections which had been made to the second report.

was presented on August 3, 1868. The sixth report, CH. VIII. dated May 28, 1870, submitted a body of law designed to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution on death. A seventh report, dated June 11, 1870, related to the revision of the Code of Criminal Procedure.

In the meantime considerable friction had arisen between the Law Commissioners and the Government of India. The Succession Bill appears to have passed through the Indian Legislative Council without very serious difficulty. Possibly the fact that it did not apply to Hindus or Mohammedans or to Europeans domiciled out of India, and that the classes thus exempted from its operation included the bulk of those to whom a succession law would be a matter of practical interest, may have had something to do with the small amount of opposition which the measure encountered. But the Contract Bill touched much more closely the trading classes, both European and native, and had a more chequered fate. In the statement of objects and reasons by which it was accompanied on its introduction into the Legislative Council in 1867 it was described as 'a body of contract law which leaves nothing to be desired, in point of simplicity and comprehensiveness, in respect of the essential equity of its provisions, and in respect of the perspicuity with which those provisions are set forth.' But in spite of these laudatory remarks the Select Committee to which the Bill was referred ventured to criticize and modify the proposals of the Commissioners with a freedom which that learned body resented. The controversy raged principally round a clause which provided in effect that a purchaser acting in good faith, and in the absence of suspicious circumstances, might acquire a good title from any person in possession of goods, in other words, that every place in India should be a market overt¹. The Select Committee objected to this

¹ This was clause 75 in the Bill as introduced. The corresponding section in the Act as passed appears to be s. 108.

CH. VIII. clause, the ground of objection being substantially that the provision would make British India an asylum for cattle stealers from the Native States. The Duke of Argyll, then Secretary of State for India, sided with the Commissioners, and expressed his views in terms which were objected to by the Government of India as derogatory to the independence of the Indian Legislature, and thus a difference of opinion about a technical point of law was elevated to the dignity of a grave constitutional controversy.

The attitude of mind of the English Law Commissioners may be inferred from the concluding paragraphs of a letter which they addressed to the Duke of Argyll on July 2, 1870. After referring to the series of reports submitted by them they say,—

‘No legislation founded on the recommendations of the Commissioners contained in the reports of 1866, 1867, or 1868 has yet taken place, and, so far as we have any information, there is no prospect of any such legislation.

‘The Commissioners felt themselves called upon nearly a year and a half ago to invite your Grace’s attention to the manner in which their reports had been dealt with, as shown by papers which were officially communicated to them. They subsequently had reason to believe that, in consequence of instructions given by your Grace, a more satisfactory course would be followed in India. These expectations have not been realized; and three bodies of law which relate to very important subjects, which cost the Commission much time and labour, and which have been in the hands of Government for four, three, and two years respectively, still remain a dead letter.

‘Whatever may be the cause of this continued inaction, its existence defeats the hope which we entertained that we were laying the foundation of a system which, when completed, would be alike honourable to the English Government and beneficial to the people of India.

‘We therefore respectfully request that your Grace will, by accepting our resignation of office, release us from the position in which we are now placed.’

This letter is signed by Edward Ryan, Robert Lowe, Robert Lush, and W. M. James.

The Duke endeavoured to soothe the ruffled feelings of the Commissioners, but in vain. They declined to withdraw their

resignation, and they wound up their last communication to the Secretary of State by saying,—

CH. VIII.

‘We must repeat that no information which has reached the Commissioners does in our opinion explain the inaction of the legislature to which we adverted in our former letter, and which we have been obliged to consider as systematic and persistent.’

It will be remembered that the Law Member of the Government of India during the greater part of this period of ‘continued,’ ‘systematic’ and ‘persistent inaction’ was no less eminent a person, and no less sincere an advocate of codification, than Sir Henry Maine.

Thus expired in a huff the third of the Indian Law Commissions. The Indian Government were allowed to take their own course with the Contract Bill, which, rather less than two years afterwards, and just before the expiration of Sir James Stephen’s tenure of office, became law as Act IX of 1872.

Sir James Stephen’s short term of office was a period of great legislative activity, especially in the direction of codifying measures. An Act prescribing rules for the limitation of suits (IX of 1871) was passed in 1871. The Evidence Bill was introduced and became law as Act I of 1872. The Criminal Procedure Code was revised and re-enacted with extensive alterations. And finally the Contract Act was passed on the eve of Sir James Stephen’s departure from India.

On April 9, 1872, Sir James Stephen, in moving the final stage of this Bill, took the opportunity of reviewing the work which had been done up to that date in the policy of codification initiated forty years before, and of expressing his opinion as to how much more legislation of the same character would be required before the codification of the law of British India could be said to be complete.

With reference to codification, he divided the law into three parts :—

- I. Current Miscellaneous Legislation.
- II. Procedure.
- III. Substantive Law.

CH. VIII. By current legislation he meant such measures as were necessary to meet particular cases. All that could be done with a view to codifying matters of this kind was to have all the Acts relating to one subject consolidated into a single enactment. Much had been done in this direction by the various Consolidation Acts, and little more was, in his opinion, required.

Under the head of Procedure he included the laws regulating the proceedings and powers of courts of justice, and the assessment and collection of the land revenue. As to the courts of justice, the two Codes of Civil and Criminal Procedure, the Evidence Act, and the Limitation Act, had each reduced to a single enactment the subject of which they treated; but further legislation was needed to simplify the laws relating to the constitution and powers of the civil courts. As to revenue-procedure, the law had been to a great extent codified, but Acts for the North-West and Central Provinces were still required.

Substantive law might, he considered, be resolved into the following main heads:—

- (a) Government;
- (b) Criminal Law;
- (c) Laws relating to Inheritance;
- (d) Laws relating to the Relations of Life—Husband and Wife, Parent and Child, Master and Servant, Guardian and Ward;
- (e) Laws relating to Contract;
- (f) Laws relating to Wrongs;
- (g) Laws relating to the enjoyment of land.

As to Government, the law was contained principally in Acts of Parliament, and could only be altered by Parliament itself. The Criminal Law was codified in the Penal Code. The laws relating to inheritance were mostly native laws, which, for obvious reasons, could not be touched, though the Hindus might very possibly be thankful for an authoritative statement of their customs. So far as native law and English

law did not extend, the Succession Act might be regarded as supplying a Code. The laws relating to the relations of life were in much the same state as laws relating to inheritance, being native customs, supplemented in some cases, overruled in others, by legislation. The Christian Marriage Acts might be consolidated; but on other subjects belonging to this branch legislation must be slow and cautious. The laws relating to contract were being dealt with by the Contract Act. This did not profess to be a complete code of the law of contract, but would require to be supplemented by additional chapters. As to laws relating to wrongs, there was a very distinct and important gap in Indian legislation. A good law of torts would, Sir James Stephen thought, be a great blessing to India. The laws relating to the land were by far the most intricate and probably the most important. The law of land revenue either was, or might soon be, put into a satisfactory shape. The law of landlord and tenant had been codified as to form by Acts for Bengal, Oudh, the Punjab, and Madras. The law regulating the rights of holders of land as between each other depended mainly on native custom; and though recorded in settlement-papers could probably not be codified for the present. The only part of this branch of the law on which it would be possible to legislate usefully was the law relating to easements. A useful Act might be passed on a branch of law which lay between substantive law and the law of procedure, and which might perhaps be called the law of relief¹.

Sir James Stephen summarized his conclusions about the codification of the substantive law as follows:—

‘As regards substantive law we shall have as much of it as will be wanted for a length of time if this Act’ (the Contract Act), ‘a corresponding Act about Wrongs, an Act about Easements, and an Act about Remedies, such as I have sketched out, are framed and passed into law.’

In the spring of 1872 Sir James Stephen was succeeded as

¹ This was subsequently dealt with by Lord Hobhouse’s Specific Relief Act (I of 1877).

CH. VIII. Law Member by Lord Hobhouse (then Mr. Arthur Hobhouse). At this date considerable uneasiness had been caused both in England and in India by the rapidity and amount of recent Indian legislation, and Lord Hobhouse, on his departure for India, received strong hints that it would be desirable to slacken the pace of the legislative machine. His own observation and experience after arrival in India satisfied him of the prudence of this advice, and induced him to direct his energies to work which, if it attracted less public attention than that of his immediate predecessor, was not less practically useful. The nature of the work done and projected during the first three years of Lord Hobhouse's term of office may be gathered from a passage occurring in a dispatch addressed on July 5, 1875, by the Government of India to the Secretary of State:—

'Since the year 1872,' observes the dispatch, 'there has been very little codification in the sense in which we have above used the term¹, unless the Code for the Criminal Procedure of the High Courts just passed, and that for the Police Courts of the Presidency towns, which we hope will soon be passed, may be considered such. On the other hand we have bestowed a great deal of attention on the consolidation of existing laws and the repeal of such as have become obsolete. Our object is to produce a new edition of Acts of Council which shall, as far as possible, represent the state of that portion of our law at the time of publication. We hope to publish in the course of the current year so much of this work as will comprise the general Acts, and the volumes containing the Provincial Acts and Regulations will follow in due course. We have put the Revenue and Rent laws of the North-Western Provinces into a more concise and methodical shape, not without considerable changes, both in substance and in procedure, the effect of which can hardly yet be seen. We are doing the same thing for Oudh, the Central Provinces, and British Burma. And we have also turned our attention to that great branch of law which consists of judicial decisions, and which, though not the subject of legislation, is so intimately connected with it as to come properly under the cognizance of our Legislative Department. We are endeavouring to prepare a Digest embodying the judicial law which has taken its place

¹ 'The expression in authoritative writings of law previously to be gathered from traditions and records of a much more flexible and less authoritative character.'

in our system, and we anticipate that such a work will not only be useful in itself, but will form the best starting-point for future plans of codification. We are also undertaking to supervise reports of current decisions, and, if possible, to put them in a better shape¹. CH. VIII.
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During this period Mr. Whitley Stokes was Secretary to the Legislative Department of the Government of India, as he had been during part of Sir James Stephen's and during almost the whole of Sir Henry Maine's term of office. It is impossible to exaggerate the debt of gratitude which is due from India to Mr. Stokes for his labours as Legislative Secretary. He was the draftsman of several of the most important measures passed by his chiefs, and, above all, it is owing to the unflagging zeal and energy with which he carried on, through a long series of years, the laborious and wearisome task of consolidation, that the Indian Statute Law has been reduced to its present compact and convenient form.

The procedure described by Sir James Stephen as the consolidation of current miscellaneous legislation involves the double process of repealing obsolete enactments, and of re-enacting in an amended and simplified form enactments still in force. This double process was carried on with great activity during Lord Hobhouse's tenure of office, and its results were shortly afterwards embodied in the two volumes of English Statutes relating to India, the three volumes of general Indian Acts, and the ten volumes of Provincial Codes (Lower Provinces Codes, Bombay Code, Madras Code, Punjab Code, Oudh Code, Central Provinces Code, North-Western Provinces Code, Ajmere Code, Coorg Code, and British Burma Code) which embraced the whole of the unrepealed Indian Acts down to the date at which those volumes were published. Armed with the selection of English Acts applying to India, with the half-dozen volumes comprising the general

¹ A new series of authorized Indian Law Reports was about this date established on the model of the English Law Reports.

CH. VIII. Indian Acts¹, and with the volume or volumes containing the Code for his own province², the Indian practitioner has almost all that he wants in the way of statute law, and possesses a law library which his English rivals may well envy. For the preparation of these volumes, and for the indispensable preliminary labour of expurgation and condensation, India is mainly indebted to Mr. Whitley Stokes.

Though the process of codification, as distinguished from consolidation, did not proceed with such rapidity in Lord Hobhouse's time as in that of his immediate predecessor, it was not suspended. He added to the collection of Codes a useful little Act, which deals with the branch of law described by Sir James Stephen as the law of relief and which became law as the Specific Relief Act (I of 1877).

In the meantime, however, the India Office pendulum, which had pointed to delay and caution in 1872, took a swing in the opposite direction after Lord Salisbury became Secretary of State in 1874. A draft Bill had been prepared for consolidating the Acts of Parliament relating to India, and the question whether it would be desirable to re-enact the section of the Indian Charter Act of 1853 which provides for the appointment of an Indian Law Commission was found a convenient peg on which to hang a dispatch³ expressing the views of the Secretary of State with respect to the general subject of Indian codification. Lord Salisbury by this dispatch directed the attention of the Government of India to the expediency of proceeding with and completing this work, and suggested that the task of preparing for the consideration of the Legislative Council the remaining branches of the Indian Code might be entrusted to a small body of eminent draftsmen selected for the purpose.

¹ There are now six volumes of General Acts.

² All the Provincial 'Codes' have been revised within the last few years. The Bengal Code is in two volumes, the Bombay Code in three; all the others are single volumes. The British Burma Code has become the Burma Code, and a thin volume contains the Code for British Beluchistan.

³ Dispatch of March 4, 1875.

The reply of the Government of India¹ pointed out the objections to a permanent Law Commission sitting and working in England. It urged that the Government of India should take on itself the responsibility of judging what new laws are wanted for India and when it is expedient to discuss and pass them. It dwelt on the importance of proceeding slowly and cautiously in the work of codification and on the risks and evils attending rapid legislation. As to the mode of proceeding, the conclusion of the Government of India was that whatever professional assistance they wanted should be obtained when required by the employment of competent persons for particular pieces of legislative work, and that the best machinery would probably be a single draftsman in India either possessed of the requisite knowledge or working under those who have it. Ch. VIII.

Lord Salisbury's answer will be found in a dispatch dated January 20, 1876. It dismisses rather curtly a good many of the arguments and observations contained in the letter from the Government of India, assumes that the work of codification must be proceeded with, and wishes to be informed what branches of the law most need codifying, in what order they should be taken up, and whether the codifying Acts should be applied generally, or only to particular parts of British India.

In the same month, January, 1876, Lord Lytton succeeded Lord Northbrook as Viceroy of India. For a period of nearly a year and a half, that is to say, until after the expiration of Lord Hobhouse's term of office, no further public correspondence took place between the Secretary of State and the Government of India on the subject of codification. The Law Member and the Legislative Secretary contented themselves with recording their several views on the subject, and depositing their minutes in the archives of the Legislative Department. Very interesting and characteristic minutes they are.

¹ Letter of Government of India, dated July 5, 1875.

CH. VIII. But in the spring of 1877 the former Secretary became the Law Member, and in May of that year, very shortly after his accession to office, the Government of India sent its long delayed reply to Lord Salisbury's dispatch of January, 1876. It contained Mr. Whitley Stokes' programme of work and plan of operations. After enumerating the branches of law which still required codification, it proceeded to indicate the order in which they should be taken up. First should come the three Bills which had been framed wholly or partly by the defunct Law Commission, namely the Transfer of Property Bill, the Negotiable Instruments Bill, and the Insurance Bill. Then the Guardian and Ward Act (XIII of 1874) might be extended to the whole of British India, and possibly to all the classes to which the Indian Succession Act applied, and the two subjects of parent and child and master and servant might be taken up. Alluvion and diluvion should next be dealt with, and then the law of easements and the law of boundaries. Then, but not till then, should be taken the subject of torts or actionable wrongs. When this had been dealt with, the outline of a complete Civil Code would be nearly filled in. There would remain the subjects of carriers (marine and inland), trusts, gifts, liens on movables and accession to movables. The order of dealing with these was unimportant. The task of arranging scientifically the various chapters of the Civil Code would then remain, and to the finished work there should be prefixed or subjoined a chapter on interpretation. The question whether the laws thus made should be applied to the population generally or only to particular classes was then discussed. An opinion was expressed that the work of codification should be carried out in India rather than in England, and the Secretary of State was requested to ask Sir Henry Thring (now Lord Thring) to select from his former pupils one willing to proceed to India, and competent to aid in the work.

An attempt was made to give effect to this suggestion, but

it appeared that no qualified person was willing to go out to India on the terms offered ¹. Under the circumstances the Government of India reverted to their former proposal that a Commission should be appointed to complete the codification of the substantive law, and to consider such other matters in relation to the Laws of India as might be referred to it by the Government, but that it should act in India under the instructions of the Governor-General in Council and report to the same authority. This proposal was assented to by the Secretary of State. CH. VIII.

Accordingly, under a notification dated February 11, 1879, Mr. Whitley Stokes, Mr. Justice Turner of Allahabad ², and Mr. Justice West ³ of Bombay, were appointed Commissioners to inquire into and consider the provisions of six Bills which had already been prepared for codifying the law relating to negotiable instruments, to the transfer of property, to alluvion, to master and servant, to easements, and to trusts, to report on these Bills, and to make such suggestions as to the codification of the substantive law of British India as might seem desirable.

In the meantime Sir Henry Maine and Sir James Stephen had been consulted by the India Office on the subject of Indian codification, and had submitted memoranda expressing their views.

Sir James Stephen's memorandum was dated July 2, 1879. It criticized the programme embodied in the dispatch of May 10, 1877, and expressed an opinion that the general plan of operations should be to pass into law a certain number of the enactments referred to in that dispatch, but that the proposal to arrange them scientifically should be laid aside. He thought that the Indian Code should consist of the following enactments :—

¹ The present writer was asked to go out.

² Now Sir Charles Turner, K.C.I.E.

³ Now Sir Raymond West, K.C.I.E.

Substantive Law.

1. The Penal Code.
2. The Law of Contract, enlarged by chapters on contracts relating to land, contracts relating to shipping, and contracts by negotiable instruments, and, if required, the contracts of service, carriage, and some others.
3. The Law of Torts or Actionable Wrongs.
4. The Indian Succession Act.

Procedure.

5. The Code of Civil Procedure.
6. The Code of Criminal Procedure.
7. The Evidence Act.
8. The Limitation Act.
9. The Specific Relief Act.

He would not attempt to make these Acts or any of them into a single body of law to be called the Indian Civil Code. He would, if necessary, add to their number; but for many years to come would regard them as practically sufficient for the purpose for which codification is required, that purpose being in his opinion that of providing a body of law for the government of the country so expressed that it may be readily understood and administered by English and native Government servants without extrinsic help from English law libraries. He was also in favour of preparing a digest of Indian decisions.

Sir Henry Maine's memorandum dwelt chiefly on the importance of codifying the Law of Torts.

The Commissioners, to whom the six codifying Bills had been referred, presented their report on November 18, 1879. The report is long, and enters into disquisitions of a very general nature; but the specific recommendations made by it are recapitulated at the end, and were as follows:—

(a) That the process of codifying well-marked divisions of our substantive law should continue;

(b) That the eventual combination of those divisions as parts of a single and general code should be borne in mind ;

(c) That the English law should be made the basis in a great measure of the future codes, but that its materials should be recast rather than adopted without modification ;

(d) That in recasting those materials, due regard should be had to native habits and modes of thought ; that the form which those materials should assume should, as far as possible, resemble that of rules already accepted ; that, in other words, the propositions of the codes should be broad, simple, and readily intelligible ;

(e) That uniformity in legislation should be aimed at, but that special and local customs should be treated considerately ;

(f) That the existing law of persons should not be at present expanded by way of codification, save that the operation of the European British Minors Act (XIII of 1874) should be extended ;

(g) That the laws relating respectively to negotiable instruments, to the subjects dealt with by the Transfer of Property Bill, to trusts, to alluvion, to easements, and to master and servant, should be codified, and the Bills already prepared on those subjects be passed into law, subject to certain amendments ;

(h) That the law of wrongs should be codified ;

(i) That, concurrently with or after framing a law of wrongs, the laws relating to insurance, carriers, and lien should be codified ;

(j) That the legislature should then deal with the law of property in its whole extent ;

(k) That preparation be made for a systematic chapter on interpretation ;

(l) That the project of framing a digest of the decisions of Indian Courts should be abandoned.

Of the six Bills reported on by the Commissioners of 1879 four were passed into law under the titles of the Negotiable

CH. VIII. Instruments Act (XXVI of 1881), the Indian Trusts Act (II of 1882), the Transfer of Property Act (IV of 1882), and the Indian Easements Act (V of 1882).

But the four codifying Acts represent only a small part of the legislation which took place under Mr. Whitley Stokes. Not to mention current legislation, various Consolidation Acts were passed, the Limitation Act was repealed and re-enacted in 1877, the Codes of Civil and Criminal Procedure were amended, and in the spring of 1882 it was thought advisable to repeal both of them, and supersede them by new Acts. The Acts passed in the first three months of 1882 would fill a volume at least equal in bulk to two of the average annual volumes of public general Acts of Parliament. The natural result of this activity was to revive, in an intenser form, the cry of over-legislation which had been raised ten years previously. Judges and other officials complained that the whole of their time was absorbed in criticizing new Bills and learning new Acts. There was a widespread feeling that India was being made the subject of legislative experiments of questionable utility and of unquestionable cost, and Anglo-Indian and native journals were for once unanimous in their protests. Echoes of these remonstrances reached England, and Sir Henry Maine found it necessary to allay the agitation on the subject by a letter to the *Times*. It was under these circumstances that the present writer was appointed to the office of Law Member of the Governor-General's Council in succession to Mr. Whitley Stokes. The hints which he received from the India Office before leaving England were to much the same effect as those which appear to have been given to Lord Hobhouse ten years before. And on arriving in India he was told from all quarters that the Legislative Department had recently been too much *en évidence*, and must content itself, at all events for the present, with assuming a more unobtrusive part. It must not be supposed that these expressions of opinion came only from the class or school who, in this country

as well as in India, view projects of codification with dislike and suspicion. On the contrary they were concurred in by such eminent advocates of codification as Sir Henry Maine and Sir James Stephen. So unanimous was the advice given to the new Law Member to hold his oars, that he might have been justified in exclaiming on taking office, *Poichè abbiamo il Papato, godiamoci*. But any such dreams of repose were not destined to be realized. His lines, as is well known, did not fall in quiet places. The measures in progress on his arrival in India touched delicate and dangerous questions, and involved legislation of the most complex and difficult character. Not to speak of more sensational topics, it became necessary to recast the system of local government in all the Indian Provinces, and to revise the relations of landlord and tenant in the majority of those provinces. The Bengal Tenancy Act alone, applying as it did to a province of sixty millions of people, occupied the greater part of two Calcutta Sessions, and the Law Member's bookshelves groaned under yards of folio volumes containing the official literature which had gathered round the subject. Enactments of a similar nature had to be passed for the Central Provinces, for Oudh, and for other parts of India. And in the year 1886 the annexation of Upper Burma necessitated the preparation of a general system of law and procedure for the newly acquired province.

It became one of the first duties of the Law Member who assumed office in 1882 to take stock of what had been done up to that time in the matter of Indian codification, and to consider what steps should be taken for carrying on the work. This duty was discharged in a note written by him in July, 1882.

Of the six codifying Bills which had been prepared by the last Indian Law Commission, four only had become law. The remaining two related respectively to the law of master and servant and to the law of alluvion and diluvion.

The Master and Servant Bill had met with much opposition

CH. VIII. from various quarters, and was open to serious objections. The demand for it came from a class of European employers who were anxious to obtain a more summary power of punishing their servants for breach of duty. The penal clauses framed to satisfy these demands had been condemned in most emphatic terms by Sir James Stephen and other eminent authorities, and were based on principles which Parliament had, within the last few years, decisively rejected. The Government of India found it impossible to proceed with any measure containing such provisions. If the penal clauses had been eliminated from the measure, and it had been reduced to a simple statement of the rules which, in the absence of special agreement, regulate the relations of master and servant, these objections would have been removed. But it appeared that no one would care about the Bill in that shape.

The Alluvion Bill dealt with a very difficult subject in a very technical way, and was not unfairly described as being unintelligible to any one who was not both a mathematician and a lawyer. It did not seem much wanted, and there seemed to be everywhere well-ascertained usages which were saved by the Bill.

Accordingly both these Bills were laid aside.

With respect to what remained in the field of codification, there were two rival programmes in existence, that sketched by Sir James Stephen in his speech of 1872, and repeated, with slight modifications, in his memorandum of 1879, and that put forward by the Indian Law Commissioners in the latter year. The former of these programmes was the less ambitious, but would commend itself to most minds as the more practical of the two. And on comparing it with the work done up to date, it appeared to have been in the main completed, with one important exception. That exception was the law of torts or actionable wrongs. Was such a law really required? Would its passing confer any practical benefits on the people of India? Both Sir James Stephen

and Sir Henry Maine had answered these questions in the affirmative. Mr. Stokes had at one time been inclined to postpone dealing with this particular subject until some other branches of the law had been disposed of, but the latest expression of opinion which he left on record was that, if the codification of substantive law was to be proceeded with, the law of torts should first be taken up. On the other hand, Lord Hobhouse had expressed doubts as to the practical utility of any such measure, and the question was how far these doubts were well founded. CH. VIII.

As to the legitimate object of codification in India Sir James Stephen's dictum might be accepted, that the object to be aimed at should be that of 'providing a body of law for the government of the country so expressed that it may be readily understood and administered both by English and by native Government servants without extrinsic help from English law-libraries.' And for the purpose of determining in what direction the work of codification could be most usefully carried on, there appeared to be applicable two or three humble and empirical tests.

1. What classes of cases, judging from the Indian Law Reports, afford the greatest material for litigation?
2. Does the litigation in these classes of cases arise in the Presidency towns, where judges are aided by the arguments of counsel and a well-stocked library, or in the country, where judges have to decide as best they may without those aids?
3. How far does the litigation arise from uncertainty of the law, and how far from difficulties inherent in the subject-matter?
4. How far is it possible to declare the law without raising difficult and delicate questions?

The application of these tests to the law relating to torts supplied a strong case for codifying at all events some portions of that law. A handy little book called the *Indian Case Law of Torts* had recently been published by an Indian Judge of Small Cause Courts. It referred to nearly 500 reported

CH. VIII. cases, by far the greater number of which were to be found in the Indian Law Reports of recent date, and a considerable proportion of which appeared to be up-country cases. The rapid growth of so large a body of case-law was *prima facie* evidence that the law required codification.

The suggestion made in the Law Member's note of 1882 was, not to attempt the codification of the whole law of torts—indeed it was doubtful whether the subject had sufficiently defined boundaries to admit of its forming a separate chapter in a theoretically complete Code—but to select such of the leading rules as experience showed to have been most frequently the subject of litigation, express them simply and clearly, arrange them on some intelligible principles, and take the opportunity of clearing up obscurities and amending defects in the existing law. There was reason to believe that an Act drawn on these lines, and being in fact simply an authoritative manual of certain rules which a country judge has constantly to apply, would be as useful and welcome an addition to his library as the Contract Act ¹.

No time was lost in setting about the preparation of a draft Bill on the subject of Torts or Civil Wrongs. Instructions to prepare such a draft were given by the Government of India, through the Secretary of State, to Sir Frederick Pollock, and several communications as to the arrangement and subject-matter of the draft passed between him and the Law Member in India. The work proved to be longer than either of them had anticipated at the outset, and though instalments reached India from time to time, the draft provisionally completed did not arrive until the autumn of 1886, when the Law Member then in office was on the point of returning to England. Under these circumstances it was necessary to leave the draft to his successor ².

¹ As to the mode of procedure, the suggestion was to employ in the first instance a draftsman working in England, under such conditions as would prevent the friction which had arisen between the Government of India and previous Law Commissions.

² No attempt to proceed with it appears to have been since made.

It will have been seen from the foregoing review that the most pressing Indian needs have been met by the framing of the Penal Code and the Codes of Civil and Criminal Procedure. These three Codes, which are by far the most important and widely used of all the Indian Codes, may be described as the outcome of the first two Indian Law Commissions. The third Commission set itself a more ambitious task, that of reducing to systematic form so much of the English rules of law as is applicable to Indian circumstances. Perhaps about as much has been done in that direction as can safely be attempted for the present. That at all events was the opinion of Sir James Stephen, the ablest and most consistent advocate of English codification. And Mr. Whitley Stokes himself admits that, 'with the exception of actionable wrongs' (on which, as has been said, a draft has been prepared), 'every important branch of the substantive Civil law has been codified in India.' If the programme laid down by Sir James Stephen be compared with the work actually done, it will be seen that such chapters of law as, according to that programme, yet remain to be written, are very few and comparatively unimportant. The Contract Act has been supplemented by the Negotiable Instruments Act, and by the provisions of the Transfer of Property Act relating to sale, lease, and mortgage. It might be feasible to add chapters on such subjects as Insurance and Maritime Contracts, but it is questionable whether they are much needed, or would be much used. It may indeed be reasonably doubted—Sir James Stephen has himself expressed serious doubts—whether portions of the Transfer of Property Act and the whole of the Trusts Act and of the Easements Act do not go beyond the requirements of the situation. In considering this question the test of practical utility ought to be rigidly applied. Codification is an expensive process. If it is to be done well—and it is not worth doing badly—it must be done by experts whose time is valuable, and must be highly paid. The case is not as though the Indian Legislative Department had nothing to occupy itself with except

CH. VIII. codification. Even if it were to leave this work undone it would still remain the hardest worked of all the Indian departments. It could not do more without strengthening its staff or seeking extrinsic aid. India is a poor country. How far are we justified in compelling the Indian taxpayer to spend Indian money on objects for which we ourselves grudge expenditure?

These considerations are suggested, not for the purpose of depreciating the admirable work done by Mr. Whitley Stokes and others, but as cautions to those who would force the pace. Before passing more new Codes it would be desirable to make sure that those already passed are working, and working well. It is easy enough to pass laws for India—the difficulty is in making them work. They are apt to remain for an indefinite time ‘in the air,’ and when they touch earth they sometimes operate in unexpected fashions. Mr. Stokes often refers to the paucity or absence of judicial decisions as a proof that a particular Act is working well. But this is a fallacious test. Judged by it, some of the Acts which have remained as dead letters on our English Statute Book would be masterpieces of legislation.

Probably we do not realize in England the extent to which the sphere of operation of some of the Indian Codes is limited by exceptions—wise and necessary exceptions—of particular classes and territories. Take the Succession Act, for instance. The fourth section of this Act declares that—

‘No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried.’

If this enactment had been applied to England it would have produced far-reaching effects, and would probably have been the subject of countless judicial decisions. In India it has ‘worked smoothly.’ But if reference is made to Mr. Whitley Stokes’ footnote on the section it will be found that the enactment ‘does not operate upon the movable

property of parties to a marriage where either of them has a non-Indian domicile, and the marriage takes place in India,' and that it 'does not apply to any marriage one or both of the parties to which professed, at the time of the marriage, the Hindu, Mohammedan, Buddhist, Sikh, or Jaina religion.' 'With this exception,' continues the annotator, 'it declares the general *lex loci* of India.' The exception covers almost all the propertied classes in India. CH. VIII.

Even among the classes to which an Indian Act normally applies, a long time often elapses before its existence is realized. A curious illustration of this occurred shortly before the present writer left India. Some time in the year 1886 a deputation arrived from the Jews of Aden, asking that they might be exempted from the operation of the Indian Succession Act (X of 1865). That Act applied to the Jews of British India, a small class of persons. Aden is technically part of British India. Therefore the Act applied to the Jews of Aden. But for some twenty years the Jews of Aden remained in blissful ignorance of its existence. At last a case raising a question of succession among Aden Jews found its way into the Civil Court at Aden. The judge looked up his law and found that the Succession Act regulated the case. His decision fluttered the community, and they asked that they might be restored to their old law. On inquiry what that law was, reference was made to a passage in the Book of Numbers¹, containing what may without profanity be called the ruling in Zelophehad's case. The text lays down the rule of succession to be observed when an Israelite dies leaving daughters but no son. It was stated that the Jews of Yemen had been under this law for some thousands of years, that it gave them what they wanted, and that they would like to remain under it. Under these circumstances the Government of India stipulated for two conditions—first, for evidence of the

¹ Num. xxvii. 1-11. The passage is of great interest in the history of the law of inheritance. It recognizes the right of the daughter, but not of the widow. The daughter must not marry out of the tribe. Num. xxxvi.

CH. VIII. particular customs of the Yemen Jews, and, secondly, for an assurance that any exemption granted to them should not be used as a precedent for granting a similar concession to the Jews of India generally. The stipulations were complied with by the production of evidence as to the laws and customs of Yemen Jews (very curious and interesting evidence it was), and by an undertaking from the leading Jews in British India that they would be content to remain under Anglo-Indian law. And the Jews of Aden were accordingly allowed to revert from Act X of 1865 to the Pentateuch.

The process of revision of the Codes has been carried on with considerable activity, both in the way of amendments and in the more drastic form of repeal and re-enactment. The first Criminal Procedure Code was repealed by Sir James Stephen in 1872, and his Code in its turn has been superseded, first by an Act of 1882 and now by an Act of 1898. If Mr. Stokes' suggestions were to be adopted the Penal Code and the Contract Act would speedily share the same fate. It would seem as if Indian codifiers built, not with brass or stone, but with materials more nearly resembling the brick and stucco of Lower Bengal. Their structures soon show signs of weathering, and require to be patched or pulled down and rebuilt. It is not desirable to try the patience of judges and practitioners by too frequent a repetition of this process, but, even if it is applied on a moderate scale and at reasonable intervals, the necessary supervision of the Codes will always supply a good deal of work for the Indian Legislative Department.

The present position of codification in India may be summarized as follows. The most pressing Indian needs were supplied by the Penal Code and the two Procedure Codes. Of the branches of English substantive law applicable to India all the most important have been codified¹. Whether the time has yet come for making a new departure by attempting to codify native law is a question which most

¹ See the list of Indian Codes below, p. 200.

authorities would answer in the negative. Meanwhile current legislation and the revision of the existing Codes require considerable and constant labour, and the staff of experts available for the purpose is limited and expensive. CH. VIII.

The British Colonies have not made such rapid progress with codification as the Indian Empire, but are in some respects in advance of the mother-country¹. Lower Canada stands alone, or almost alone, in the possession of a Civil Code, which came into force in 1866, and is based on French law. Canada, New South Wales, Victoria, New Zealand, and Queensland have Criminal Codes. Some of the minor Crown Colonies have adopted with modifications the Penal Code which was prepared by Mr. Justice Wright for Jamaica, but which never came into force in that Colony. Ceylon and the Straits Settlements have adopted or adapted some of the Indian Codes; and one or two of the West Indian Colonies, such as Grenada, have been active in codification. A large number of the Colonies have adopted the three small English codifying Acts, the Partnership Act, the Bills of Exchange Act, and the Sale of Goods Act. Codifica-
tion in
British
Colonies.

The oldest American Code is the Civil Code of Louisiana, which was originally passed in 1808, five years after the purchase of the province of Louisiana from the French, and is based on the French law. The first section runs as follows:— Codifica-
tion in
the
United
States.

‘ That the work entitled “ Digest of the civil laws now in force in the territory of New Orleans with alterations and amendments adapted to its present system of government ” which work is divided &c. . . . and containing to wit &c. . . . is hereby declared in force in this territory and shall therein have full execution.’

An amended code was passed in 1824 and has since then been revised from time to time.

Codification in the United States is mainly associated with the names of Edward Livingston and David Dudley Field. Livingston was appointed in 1821 to draw a Code of Criminal

¹ See below, p. 200.

CH. VIII. Law and Procedure for the State of Louisiana. It was substantially completed in 1824, and partially adopted by the State at that time, but was not published in a complete form till 1833, about the time when Macaulay and his brother Commissioners were setting about their task of framing Codes for British India. Livingston's Code has exercised great influence on the codification of criminal law in other parts of the world, especially in English-speaking countries.

The State of New York, under its constitution as revised in 1846, appointed David Dudley Field with four others to be Commissioners for codifying the substantive and remedial law of the State. The Commissioners framed a Code of Civil Procedure, which was enacted by the State in 1848, and a Code of Criminal Procedure, which did not become law until 1881. Their Civil and Penal Codes were reported complete in 1865 and 1866. The Penal Code became law in 1882; the Civil Code twice passed the legislature, but was twice vetoed by the Executive, and is still in abeyance. The provisions of the Codes of Civil and Criminal Procedure appear to have been adopted with modifications in several of the States. The influence of Mr. Field's Civil Code is apparent in the Indian Contract Act of 1872, but it does not command as much admiration among lawyers as it did some thirty or forty years ago.

California has a more complete system of codes than any other State. All the codes were passed in 1872 and came into force in 1873. They are (1) The Political Code (which contains the whole constitutional and administrative law, including local government law, and also a part dealing with 'the definition and sources of law; the common law; the publication and effect of the codes; and the express repeal of statutes'). (2) The Civil Code. (3) The Code of Civil Procedure (including the organization of the courts). (4) The Penal Code (containing a part dealing with criminal procedure and another part dealing with prison administration in addition to the part dealing with crimes and punishments).

The Civil Code and Penal Code are based on the corresponding New York Codes. **Ch. VIII.** Dakota has seven codes, passed in 1877.

During recent years the efforts of law reformers in the United States have been directed less towards the codification of the laws of each State than towards the promotion of uniformity of legislation in the different States. In 1896 the national conference of State Commissioners on uniform legislation recommended for adoption by the various States a general Act relating to negotiable instruments. This Act was adopted by New York, Connecticut, Florida, and Colorado in 1897, by Virginia, Maryland, and Massachusetts in 1898, and by North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Washington, and Wisconsin in 1899. It was also adopted by the United States Congress in 1899 for the District of Columbia.

On the continent of Europe¹, France still retains the five Napoleonic Codes of 1803 to 1810, the Code Civil, Code de Procédure Civile, Code de Commerce, Code d'Instruction Criminelle, and Code Pénal, though they have been much amended, and the provisions of some of them, especially of the Code de Commerce, are antiquated². Codifica-
tion on
the Con-
tinent.

The unification of Germany gave a great impulse to the codification of German law³. In 1871 the Imperial Reichstag re-enacted for the Empire a Criminal Code which had been passed for the North German Confederation in 1870, and the Bills of Exchange Code and the Commercial Code

¹ For information as to the Criminal Codes of different countries, see Liszt, *Das Strafrecht der Staaten Europas*, Berlin, 1894, with supplementary information in the second volume, *Das Strafrecht der aussereuropäischen Staaten*, which was published in 1899. For Commercial Codes, see Borchardt, *Die geltenden Handelsgesetze des Erdballs*, 5 vols., Berlin, 1884-1887, with supplements going down to 1896. As to the law of Bills of Exchange, see Borchardt, *Vollständige Sammlung der Wechsengesetze aller Länder*, Berlin, 1871; Borchardt, *Sammlung der seit dem Jahre 1871 publizierten Wechselgesetze*, Berlin, 1883. Many of the more important Codes are to be found in the useful *Collection de Codes Étrangers*, published by the French Society of Comparative Legislation.

² See above, p. 11.

³ See above, p. 18.

CH. VIII. which had previously been passed as State laws. Codes of Civil and Criminal Procedure, the Code organizing the Imperial Court and the several State Courts, and the Bankruptcy Code, came into force in 1879. The edifice was crowned by the German Civil Code, which was passed in 1896, and came into force at the beginning of 1900. At the same date were brought into force revised versions of the Commercial Code, the Code of Civil Procedure, and the Bankruptcy Code.

Austria is still under its Civil Code of 1811¹. It has a Criminal Code of 1852. The Austrian Bills of Exchange Code (1850), and Commercial Code (1863), were almost identical with the corresponding German Codes enacted about the same time. The Commercial Code which each of the German States had previously enacted as State law was in 1869 made federal law for the North-German Confederation, and in 1871 was made federal law for the German Empire. This is the Code which is still used in Austria, but has since been amended for Germany. Austria has also a Code of Criminal Procedure of 1873, a Code of Civil Procedure of 1895, and Acts of 1896 for regulating the execution of civil process and the organization of the courts.

Hungary has a Penal Code of 1870, a Commercial Code of 1875, a Bill of Exchange Code of 1876, and a Criminal Code of 1896.

Switzerland has an admirable Law of Obligations (1883), and also a General Bankruptcy Law. It is understood that the Federal Legislature is engaged in the task of attempting to codify other branches of its law.

Belgium is still governed by the French Civil Code, and has a Commercial Code of 1872, based on the French Code de Commerce. It has also a Penal Code of 1867.

The Netherlands have a Commercial Code of 1838, and also a Civil Code, a Penal Code, and Codes of Civil and Criminal Procedure. The Penal Code came into force in 1886.

¹ See above, p. 17.

In Italy the political unification of the country led, as CH. VIII. in Germany, to a demand for unification of law and for consequent codification. It has a Code of Criminal Procedure, a Civil Code, and a Code of Civil Procedure, which was passed in 1865, and came into force in 1866, a Commercial Code, 1882, and a Penal Code, of which the latest edition dates from 1889.

Spain has a Penal Code of 1870, Codes of Civil and Criminal Procedure dating from 1881, a Commercial Code of 1885, and a Civil Code of 1890.

Portugal has a Civil Code of 1867, a Penal Code of 1886, and a Commercial Code of 1888.

The Scandinavian countries have codified various parts of the law, as also have Roumania and other smaller States. Egypt has a Civil Code, a Mercantile Code, a Maritime Code, a Criminal Code, and Codes relating to Civil and Criminal Procedure.

It may be worth while to inquire in conclusion why codi- General conclusions. fication has been less successful in England than elsewhere, and to see what practical lessons may be drawn from the experiments and failures of the century which has elapsed since Bentham wrote.

Some of those lessons have been summarized above. On Advantages of codification. the one hand, we have learned that the most familiar argument against codification, namely, that it checks the natural growth of the law and hinders its free development, though it may apply to bad, does not apply to good codification. No country has studied law, both historically and systematically, with more fruitful results than Germany. In no country has codification been more successful. Nor is there reason to apprehend that the German codes will arrest the progress of German law, whether in the form of judicial development or of legislative amendment. On the contrary, the scientific formulation of existing rules, provided the mistake is not made of attempting to stereotype details, illustrates and brings into prominence their defects, and thus stimulates

CH. VIII. their judicial development, and suggests and facilitates legislative amendments. The chief reason why so many of the statutory amendments of the English common law have been unsatisfactory in form and in effect is that they necessarily take the form of exceptions from indefinite or imperfectly formulated rules. If the rules were formulated, their statutory modifications would fit more easily and naturally into the general system, instead of being awkward excrescences, which tend to embarrass the courts in their application and development of general principles, and are consequently regarded with jealousy and suspicion by the judges.

Difficulties in way of codification.

On the other hand, we have learned to form a more modest conception of what codification can effect, and to realize more clearly the difficulties which it involves, especially in countries which have already an advanced system of jurisprudence. Those difficulties are so serious as to deter any prudent legislature from attempting the task on a large scale, except under strong pressure from practical needs. In British India administrative exigencies led to the enactment of codes suitable to, and sufficient for, the requirements of the situation. For African protectorates and places under consular jurisdiction similar exigencies have been met by more rudimentary codes framed under the authority of the Foreign Jurisdiction Acts. On the continent of Europe the requisite motive power for codification has been supplied by the strong impulses which have made for national unity, and by the practical inconveniences arising from the co-existence of different systems of law in a country under the same political government. The gravity of those practical inconveniences in Germany is well illustrated by a paper contributed in 1896 by Dr. Schuster to the *Law Quarterly Review*¹. In other words, the strongest motive power for codification on the Continent has been, not the desire to improve the form of the law, but the desire to make it more uniform by removing unnecessary and inconvenient local differences. But that

¹ Vol. xii. pp. 17-34; and see above, p. 18.

motive does not exist in England. Our Norman, Angevin, and Plantagenet sovereigns, the first William, the second Henry, the first Edward, by establishing a strong central government and strong central courts of justice, gave greater national and legal unity to England than was possessed by any continental State until the present century. Under the steady and continual pressure of the legislature and of the superior courts, local differences of customary law have been almost obliterated. The common law of England is the common law of Ireland also. It is true that the common law of Scotland is different, but most of the practical inconveniences arising from the co-existence of two systems of law in the same island have been smoothed away by the gradual assimilation of various branches of law, especially of commercial law. The differences which remain are mostly in those branches of the law, such as the law of marriage and the law of real property, which are the most difficult to touch, and usually the last to yield to the levelling hand of the law reformer. In England, up to this time, the only effective demand for codification has proceeded from the commercial classes, and arises in the region of commercial law, where, owing to its cosmopolitan character, the need for the formulation of simple and generally intelligible rules, and for the removal of local differences, is more strongly felt than in other branches of the law. Professional lawyers, as a rule, take no interest in the question. Their indifference is largely due to the defective and haphazard system of English legal education, under which the student is usually left to pick up odd fragments of knowledge in court or in barristers' chambers, and is rarely compelled or urged to take any general or scientific view of the principles which he has to apply. What is needed to supply the motive power and the material for codification in England is the improvement of legal education, and the concomitant improvement of legal textbooks. If there is truth in Bentham's dictum, that 'he who has been least successful in the composition of a code

CH. VIII. has conferred an immense benefit,' it is more true that he who has written a good textbook has gone halfway towards framing a code. A good textbook has often been the foundation of a code, and in the meantime is not a bad substitute.

Case for dealing with criminal law.

Whilst it must be admitted that the motive force which makes for codification is less powerful in England than in other countries, it is impossible to view with satisfaction, or, indeed, without a certain degree of humiliation, the entire cessation during recent years of any effort to improve the form of English law, and the apathy with which that cessation has been regarded. It may be that Fitzjames Stephen's draft Codes were framed on too ambitious a scale, and that their workmanship was deficient in accuracy and finish. But it is impossible to deny that he was right in his view as to the branches of the English law to which the process of codification might with most advantage be applied. England has in substance, though not in name, a Code of Civil Procedure in the rules of the Supreme Court and of the County Courts, and the statutory provisions by which they are supplemented and supported. But it has no Criminal Code, and no Code of Criminal Procedure, and the want of them produces practical and substantial inconveniences. If we had them, we should not be constantly having to improvise, or to borrow from Anglo-Indian sources, the simple codes of criminal law and procedure required for the administration of the uncivilized or semi-civilized countries from time to time placed under the authority or protection of the British Crown, and it would have been unnecessary to write a chapter in an official manual for the guidance of military officers in parts of the world where they have to administer British criminal law¹.

As to criminal procedure, if a complete code presents serious difficulties, it would be a great advantage were the legislature to do for England what it did for Scotland by the

¹ See chapter vii of the official *Manual of Military Law*.

Criminal Procedure (Scotland) Act, 1887¹, and schedule a few simple forms of charges which might be substituted for the cumbrous and prolix indictments required by existing practice.

As to substantive criminal law, if codification of the law as a whole is considered too ambitious a task (though it is a task from which our self-governing colonies have not shrunk), there are particular chapters of the law which might with great advantage be recast and expressed in a simpler form. Some half-dozen sections could be made to embody the whole of the law relating to perjury and false statements, and to supersede the numerous special enactments by which the deficiencies of the existing law are supplied². A similar process could be applied to the law of forgery. The Larceny Act, 1861, has been described by high authority³ as 'a thing of shreds and patches.' It is a clumsy, confused, and defective piece of legislation, through the interstices of which scoundrels escape, to the great discredit of our law. In the year 1891 occurred an extradition case, in which it was clear that a man who was 'wanted' in France had criminally misappropriated money, but there was great difficulty in bringing him within any of the specific provisions of the Larceny Act. In the course of his judgement, Wills J.⁴ remarked :—

'I cannot help saying that I share a certain feeling of humiliation, which my learned brother has expressed, when one is obliged to confess formally to a neighbouring country that a great part of the atrocious things which have been done by this man, if the evidence is to be relied upon, are not punishable by English law. It does seem an extraordinary thing that a man being entrusted with money by other people for investment, should be able to put it into his own pocket fraudulently and dishonestly, and yet commit no crime punishable by English law.'

A few provisions, not difficult to draw, or, one would think, difficult to pass, would make the English law of theft simple, rational, and effective.

¹ 50 & 51 Vict. c. 35.

² See the Perjury Bills of 1894 and 1895.

³ Cave J., *In re Belencontre* (1891), 2 Q. B. 122, at p. 137.

⁴ See *In re Belencontre* (supra), p. 141.

CHAPTER IX

INDIAN AND COLONIAL LEGISLATION

CH. IX. THE contents of this chapter are based largely on the replies¹ to a series of questions which, in the year 1895, were, at the instance of the Society of Comparative Legislation, sent by the Colonial Office to the various Colonial Governments. The questions so sent were as follows:—

I. *Common Law as the Basis of Statute Law.*

1. What is the common law of the colony? Under what circumstances, and by whose authority, was it introduced?
2. Is there any law applying exclusively to particular races or creeds?

II. *Statute Law.*

1. Of what does the statutory or enacted law of the colony consist? To what extent is it embodied in charters, regulations, Orders in Council, Ordinances, or Acts?
2. To what extent do the statutes of the United Kingdom operate in the colony by virtue of either—
 - (a) Original extension of English law to the colony;
 - (b) Express provisions of any Order in Council or charter; or
 - (c) Express adoption by the legislature of colony?
3. Is the statute law of any other colony in force in the colony? (This may happen where one colony has been severed from another.)
4. Is any code or other body of enacted law of non-British origin in force in the colony?

¹ For the replies to these questions see the *Journal of the Society of Comparative Legislation*, vol. i. pp. 134-190, 358-385; vol. ii. pp. 258-298. New Series, vol. i. pp. 70-74, 296-301; vol. ii. pp. 86-117, 284-288. The replies are not quite complete, but they are sufficient to illustrate the systems prevailing in different parts of the Empire. Some of the results have been summarized in an article on 'The Sources of the Law in the Colonies,' by Professor Harrison Moore. *Journal*, New Series, vol. ii. p. 276.

III. *Methods of Legislation.*

1. By whom are drafts of legislative measures prepared? Is there any official draftsman? If so, by whom is he appointed, to whom is he responsible, and what are his staff and duties? Do his duties extend to measures introduced by private or non-official members of the legislative body? CH. IX.

2. What is the constitution of the legislative chamber or chambers through which measures have to pass? (A reference to statute law, or charter, or Order in Council, or to any recognized textbook will suffice.) If there are two chambers, may measures be introduced in either¹?

3. Are draft measures published before introduction, or before any other stage? If so, under what rules?

4. Through what stages does a measure pass before it becomes law?

5. Is any opportunity afforded for referring measures, while in course of passage through the legislature, to any special officer or committee on points of form?

6. Have any steps been taken to secure uniformity of language, style, or arrangement of statutes either by means of a measure corresponding to 'Brougham's' Act (13 & 14 Vict. c. 21), or to the Interpretation Act, 1889 (52 & 53 Vict. c. 63), or by official instructions or otherwise?

7. Is there an annual session of the legislature? Are there any fixed or customary periods of session?

8. How are the Acts or Ordinances of the colony numbered or distinguished? Are they numbered by reference to the calendar year, or to the regnal year, or in any other way? Is it the practice to confer for convenience of citation a 'short title' on each Act or Ordinance? How long has this practice been followed?

9. Are private Bills (if any) treated separately, and under different conditions from Public Bills? On what principle is the line drawn between public and private Bills? Are private Acts or Ordinances separately numbered?

10. Does any practice exist of accompanying a measure on its introduction by an explanatory memorandum?

IV. *Publication of Statutes.*

1. In what manner and under what authority are statutes promulgated? What evidence is accepted of a statute having been duly passed?

2. In what form or forms, and under what authority, are statutes printed for publication?

3. Are the statutes of each session published in a collected form at the end of the session?

¹ The answers to these questions are omitted, as involving too long a discussion of the constitutional law of the colonies.

- CR. IX. 4. Are the periodical volumes of statutes accompanied by (a) an index and table of contents, (b) a table showing the effect on previous legislation?
5. What collective editions (if any) of the statute law of the colony have been published, and whether by the Government or by private enterprise? Are these or any of them periodical? Do such editions comprise those Acts of the United Kingdom in force in the colony?
6. Is there any edition of 'Selected Statutes' corresponding to Chitty's 'Statutes of Public Utility'?
7. How are private Acts published?

V. *Revision of Statutes.*

1. Have any steps been taken for the revision and expurgation of the statute law, whether periodically or otherwise? What machinery, if any, exists for this purpose?
2. Is there any edition of 'Revised Statutes' showing those actually in force? If so, under what authority is it prepared and published, and what is the date of the latest edition? Is it published at periodical intervals, or how otherwise? Are the contents arranged alphabetically, chronologically, or on any other principle?

VI. *Indexing of Statute Law.*

Is there any general index to the statute law of the colony? If so, on what principle is it arranged and after what interval is it revised? Does it include both public and private Acts or Ordinances, and the statutes of the United Kingdom which are in force in the colony? Is it accompanied by any tables showing how each statute has been dealt with? What is the date of the latest edition?

VII. *Consolidation and Codification.*

1. What steps have been taken to consolidate the whole or particular parts of the statute law, or to codify any branches of the law?
2. Does any machinery exist for this purpose? Is the work now in progress?
3. What 'codes' are now in force in the colony? When, and by whom, were they prepared, and on what materials were they based?

VIII. *Subordinate Legislation.*

What official or other machinery exists for the preparation, passing, or promulgation of measures of subordinate legislation, such as rules or orders made by the Governor, or a minister or department under the express authority of statute or ordinance? Is there any, and what collection of, or index to, such subordinate measures?

I. COMMON LAW AS THE BASIS OF STATUTE LAW.

The general principle is that where a British colony is established by settlement, that is to say, where British subjects settle down in an unoccupied or uncivilized country, they take with them so much of the English law as is suitable to the circumstances of their case, but that where a British colony is acquired by conquest or cession, the previous law remains, until, and except so far as, it is altered or superseded by legislation¹.

CH. IX.
General principles.

In the great dependency of British India, English law is held to have been introduced into the three Presidency Towns of Calcutta, Madras, and Bombay, by the charters of the eighteenth century which established courts of justice for these towns.

Outside the Presidency towns the East India Company, while exempting Englishmen from the jurisdiction of the local courts, endeavoured to administer native law to natives. Thus they applied the Mahomedan criminal law, which they found in force, and directed that in civil cases the personal law of the Hindu or the Mahomedan should be applied, as the case required. But it was soon found that portions of the Mahomedan criminal law could not be administered by civilized judges, and the Hindu and Mahomedan law relating to civil rights was on many points vague and defective. Hence both the criminal and the civil law applicable to natives of India were largely modified by legislation, and by the judicial application of English legal principles introduced under the general direction to observe 'justice, equity and good faith'².

The result is that both the local and the personal law of

¹ See Lord Mansfield's judgement in *Campbell v. Hall* (1774), 20 State Trials, 304, and the curious preamble to the Declaratory Act passed for the Bahama Islands in 1799. *Journal of the Society of Comparative Legislation*, New Series, i. 296.

² On the application of English law to natives of India, see chapter v of the present writer's book on the *Government of India*.

CH. IX. — the country have been to a great extent displaced by English law, much of which is formulated in the Anglo-Indian codes. The criminal law and the law of criminal and civil procedure are based wholly on English principles. So also, subject to some few exceptions, are the law of contract and the law of torts or civil wrongs. But within the domain of family law, including the greater part of the law of succession and inheritance, natives of India still retain their personal law, either modified or formulated, to some extent, by Anglo-Indian legislation. Hindus retain their law of marriage, of adoption, of the joint family, of partition, of succession. Mahomedans retain their law of marriage, of testamentary and intestate succession, and of *Wakf* or quasi-religious trusts. In the Madras Presidency the legislature have dealt with, and to some extent recognized, the curious system of polyandry which prevails among the Nairs of Malabar¹. The law relating to the tenure of land in the different provinces of India is represented by enactments which are based on and supplemented by local usage.

Channel
Islands.

In the Channel Islands, which are a fragment of the Duchy of Normandy, the common law is based on the ancient customs of the Duchy.

British
colonies
generally.

In the great majority of the British colonies the common law is that of England, either brought by the colonists at the time of settlement, or introduced by subsequent legislation.

French
law in
Canada
and else-
where.

In the province of Quebec the common law is that of France, not the law of the Napoleonic codes, but the earlier *Coutumes de Paris* as formulated and modified by the *Ordonnances* of Louis XIV and Louis XV. Commercial matters, however, are regulated not by French but by English law.

Mauritius and the Seychelles were ceded by France to England at a time when the French Civil Code, Code of Civil Procedure and Commercial Code had, but the Penal Code had not, acquired the force of law in the islands, and

¹ See *Journal of the Society of Comparative Legislation*, ii. 146.

therefore the latter code is not, though the former codes to some extent are, in force in those islands. CH. IX.

St. Vincent, in the West Indies, was formerly governed by the *Coutume de Paris*, and though most traces of French law have disappeared from the island, it is said that some old French *arrêts* are still in force.

In Trinidad and Tobago, though the common law is described as being that of England, there are said to be a few survivals of Spanish law.

In Ceylon, in the South African colonies and in British Guiana, the common law is still Roman-Dutch, though extensively modified by English law.

In Ceylon the Roman-Dutch law seems to survive only in a fragmentary condition. 'The continued existence,' says Mr. L. B. Clarence¹, 'of remnants and traditions of this law in a decaying and semi-obsolete condition has been the parent of much unwholesome uncertainty Theories and remnants of procedure originally founded on Dutch institutions no longer extant still linger to hamper and confuse the administration of justice. Lawyers are largely educated from English textbooks, and few can read the Latin of the Roman-Dutch jurists. Yet, in spite of wholesale introductions by statutes of English law, pure and simple, in various departments, various remnants of Roman-Dutch doctrine still lurk in all directions.' The Roman-Dutch criminal law is now superseded by a Penal Code of 1883 largely modelled on the India Penal Code. And, among other topics on which English law has been specifically introduced, are bills of exchange, shipping and maritime matters, partnerships, banking, principals and agents, carriers by land, fire-insurance, and evidence.

In the Cape Colony the survival of Roman-Dutch law is more extensive. But a Cape Act of 1879 applied to the Cape English law in maritime cases and in cases relating to questions of fire, life and marine insurance and stoppage *in*

¹ See *Journal of the Society of Comparative Legislation*, i. 231.

CH. IX. *transitu*. And in many other respects the provisions and principles of Anglo-Dutch law have been much modified by legislation¹.

In British Guiana, an Ordinance of the colony has declared English mercantile law to prevail.

Malta. The common law of Malta is still that which was in force when the island became a British possession. It is based on Roman law, modified by common law, feudal law and custom, and was to some extent codified by the Grand Masters of the Order of St. John of Jerusalem, the most important code being the code Rohan of 1784².

Cyprus. In Cyprus, which is not a colony, the common law is that of the Ottoman Empire, based upon the Shari or Mahomedan sacred law. The Cyprus Courts of Justice Order, 1882, provides for the application of Ottoman law to Ottoman subjects, and English law to British subjects³.

Laws applicable to particular races and creeds.
India. When we come to consider laws applicable exclusively to particular races or creeds, we find that British India supplies the most conspicuous illustration of the *régime* of personal law which prevailed so largely in Europe after the downfall of the Roman Empire. Hindus and Mahomedans are governed by their own laws in many matters, and separate laws have been enacted or recognized for Parsees, Buddhists, and others.

Similar recognition of the laws or customs of particular races or creeds has been found necessary in several of the colonies.

Ceylon. The extent to which European law has been applied to natives of Ceylon is described by Mr. L. B. Clarence, late judge of the Supreme Court of the island, in an interesting

¹ See the article by W. F. Craies on 'The Law of South Africa,' *Journal of the Society of Comparative Legislation*, New Series, vol. ii. p. 233.

² See the reports presented to Parliament in 1838 and 1839 by John Austin and George Cornewall Lewis, and the case of *Gara v. Ciantar* (1887), L. R. 12 A. C. 557.

³ *Statutory Rules and Orders*, Revised, iii. 436. See Articles 23-25 of the Order.

paper contributed by him to the *Journal of the Society of Comparative Legislation*¹. 'Compared with India,' he says, 'there was less of ascertainable native law in the island when our rule began,' and 'upon the whole the administration in Ceylon has paid less attention than the Government of India to the remains of native law and usage.' Under Dutch rule a compilation of customary law, styled the *Thesawalamei*, or *Teswalamai*, was made for the Tamils in the extreme north of the island. And under English rule, when the Kandyan country of the interior was annexed, a code of Kandyan customary law, under the name of '*Nitinighanduva*,' was compiled by native experts. But in the maritime districts native usage appears to have been almost entirely displaced by European law, and in the Kandyan country native custom appears to have been much modified by the action of the legislature and the courts. In matters relating to marriage, succession, and inheritance, Mahomedans are governed by their own customs, as codified and promulgated by authority of the British Governor in 1806.

In the Straits Settlements, where the law of England is the common law, it has been held to be subject, in its application to alien races established in the Settlements, to such modifications as are necessary to prevent it operating unjustly or oppressively². And the legislature of the Straits Settlements has passed special laws relating to the marriage of Hindoo widows, and the marriage, divorce, and intestate succession of Parsees.

An Ordinance of Hong Kong recognizes the validity of Chinese wills made in accordance with Chinese law and usage. In Labuan provision is made by Ordinance for the settlement of disputes concerning marriage, divorce, and probate matters between Mahomedans according to Mahomedan law or custom.

¹ i. 227.

² By Sir P. B. Maxwell, C. J., in *Choa Choon Neo v. Spottiswoode*, approved by the Judicial Committee of the Privy Council in *Ong Chang Neo v. Yeap Cheah Neo*. L. R. 6. P. C. 38.

CH. IX.
African
colonies.

Recognition of native customs is frequent in the African colonies. Thus Natal has enacted a Native Code embodying such of the customs in force as could be recognized by a civilized government. In the courts of the Cape Colony, native law is administered in native cases. In Lagos, Gambia, and the Gold Coast there are directions that native laws and customs are to be observed 'where possible,' or 'so far as they are not repugnant to natural justice.' These laws and customs include the Mahomedan law in regions where there is a Mahomedan population, as in the protected territories adjoining the Gambia colony.

Austral-
asia.

The customs of the aboriginal natives of the Australasian continents and islands are mostly too rude for recognition by civilized courts, and the laws which have been passed in West Australia, New Guinea, Fiji, and elsewhere, for these races deal with them as constituting a special class, under special disabilities, and requiring special protection.

II. STATUTE LAW.

Materials
of which
statute
law of
British
possession
is
composed.

The statutory or enacted law of a British possession, be it colony or dependency, consists of the enactments of the local legislature, supplemented by certain Imperial enactments, and, in some cases, of enacted law in force at the time of conquest or cession. The laws passed by the legislatures of British India and of the self-governing colonies are called Acts. Those passed by the legislatures of Crown colonies are usually called Ordinances. The Imperial legislation consists either of Acts of Parliament, or of Orders of the King in Council, or of Charters, Letters Patent, Proclamations, or Instructions having the force of law. The Acts of Parliament locally in force are those brought by the settlers with them, or declared to be in force at a particular date by an Order in Council, Charter of Justice, Charter of Government, or local enactment, or extended subsequently to the possession by express terms or by 'necessary intendment.'

Sometimes a Charter or Order in Council will declare all English Acts in force at a particular date to be in force in the possession so far as they are applicable to local circumstances. Sometimes it will enumerate specifically the English Acts which are to be locally in force. Sometimes a local enactment will apply specifically particular English Acts. More often it will copy English legislation by enacting similar provisions with adaptations suitable to local requirements.

CH. IX.

The Imperial Parliament has, theoretically, power to legislate for all parts of the King's dominions, but, in accordance with constitutional principles and practice, does not, as a rule, interfere with matters which are within the competency of a local legislation. The matters with which it deals are, speaking broadly, matters of Imperial, as distinguished from local, concern, and those matters are, in the case of the self-governing colonies, very few in number.

Legisla-
tive
powers of
Imperial
Parlia-
ment.

For territories acquired by conquest or cession, and now, under statute¹, for territories occupied by settlement, the King has power to legislate by Order in Council. But that power is held to cease, except so far as it is reserved, when a local legislature is established². Hence Orders in Council of a later date are made either under a reserved power, or under a power conferred by an Imperial Act of Parliament extending to the possession.

Where one British possession has been severed from, or carved out of, another, certain laws of the original possession may remain in force in the detached portion. Thus certain laws of New South Wales are in force in Victoria and Queensland, and certain British Indian enactments in the Straits Settlements.

Effect of
severance
of one
possession
from
another.

In a few instances, such as the French codes still in force in Mauritius and the Seychelles, and the Maltese codes in Malta, portions of the enacted law are of foreign origin.

Survivals
of foreign
enacted
law.

¹ 50 & 51 Vict. c. 54.

² *Campbell v. Hall*, 20 State Trials, 304; and 50 & 51 Vict. c. 54, s. 6.

CH. IX. In every case the direct enactments of the legislature will be found to be supplemented by rules or regulations made under statutory or other authority.

Illustrations. These general statements may be illustrated by a few typical instances.

The Indian Statute Book.

The Indian Statute Book is of a complex nature¹. The classes of enactments of which it is composed may be grouped as follows :—

- | | | |
|----------------------------------|---|--|
| English legislation. | { | <ul style="list-style-type: none"> I. Acts of Parliament. II. Orders in Council made by the King in Council. |
| Indian legislation. | { | <ul style="list-style-type: none"> III. The old Bengal, Madras, and Bombay regulations. IV. Acts of the Governor-General in Council. V. Regulations made by the Governor-General in Council under the Government of India Act, 1870. VI. Ordinances made by the Governor-General in Council. VII. Acts of Local Legislative Councils. |
| Derivative legislation in India. | { | <ul style="list-style-type: none"> VIII. Statutory rules, &c., made in India under the authority of English legislation. IX. Statutory rules, orders, regulations, by-laws, and notifications made under the authority of Indian legislation. X. Rules, laws, and regulations made by the Governor-General or Governor-General in Council for 'non-regulation provinces' before 1861, and confirmed by s. 25 of the Indian Council Act, 1861. |

The Acts of Parliament applying to India may be divided into three classes ; (a) Acts applying in terms to India,

¹ See the article by Mr. M. D. Chalmers in the *Journal of the Society of Comparative Legislation*, ii. 299, and the present writer's *Government of India*, p. 124.

(b) Acts applying in terms or by necessary implication to the whole of the King's dominions, and (c) Acts applying only to Presidency towns. The last class consists of the Acts held to have been introduced by the charters of justice granted for Calcutta, Madras, and Bombay.

The few Orders in Council which are in force in India are Orders made under the authority of English Acts of Parliament, such as the Order in Council confirming the Extradition (India) Act, 1895 (IX of 1895).

The Bengal, Madras, and Bombay regulations are the enactments passed by the legislatures of the three Presidencies before a legislature was established for the whole of British India by the Government of India Act, 1833 (3 & 4 Will. IV. c. 85). Some of these regulations have been extended, with or without modifications, to other provinces, but most of them have now been repealed by subsequent Indian legislation.

The Acts of the Governor-General in Council are Acts passed, either for the whole or for particular parts of British India, under the Act of 1833 as modified by subsequent enactments, of which the most important is the India Councils Act, 1861 (24 & 25 Vict. c. 67). These Acts have in some cases extra-territorial operation. Thus under an Act of 1869 (32 & 33 Vict. c. 95) the Governor-General in Council can make laws for native Indian subjects anywhere, either within or without British India.

The regulations made under the Government of India Act, 1870 (33 Vict. c. 3), must be distinguished from the old Bengal, Madras, and Bombay regulations, and are laws made by a more summary method for the less advanced parts of British India by the Governor-General in his executive, as distinguished from his legislative, Council.

The Ordinances are temporary laws, made in cases of emergency by the Governor-General without either his executive or his legislative Council. The power of making these Ordinances is rarely exercised, and they may not remain in force for more than six months,

CH. IX. The Acts of the Local Councils are the enactments passed by the legislative bodies which have been established for the provinces of Madras, Bombay, Bengal, the North-Western Provinces with Oudh, the Punjab, and Burma.

The class of laws made under powers of derivative legislation corresponds to the numerous statutory rules and orders which are made in the United Kingdom under the authority of Acts of Parliament¹, but the power of making such rules and orders is more freely exercised in India.

Canadian
statute
law.

The Dominion of Canada resembles British India in having both a central legislature and local legislatures, but differs from it materially in being a self-governing colony with a responsible government of its own.

Its statutory or enacted law is described by Mr. McCord, law clerk of the Canadian House of Commons, as consisting of—

- (1) Imperial Statutes extending to Canada ;
- (2) Imperial Orders in Council made under such statutes and extending to Canada ;
- (3) Statutes of the Parliament of Canada, and, within each province, statutes of the legislature of that province ;
- (4) Orders of the Governor-General in Council, made under Dominion statutes, and, within each province, orders of the Lieutenant-Governor thereof in Council made under provincial statutes.

Besides Imperial statutes made applicable ' by the express words or intendment thereof,' Imperial statutes operate in Canada, either by original extension of English law to the colony, so far as applicable to the circumstances therein, or by virtue of Orders in Council, to the extent authorized by the statutes under which they are made, by virtue of express adoption by the local legislature. Thus the first Act of the legislature of Upper Canada (now Ontario), in 1792, introduced the laws of England as they stood on October 15,

¹ See above, Ch. III.

1791, in all matters of controversy relative to property and civil rights, and the English law of evidence. In the North-West Territories, the statute law of England of 1670, the date of the Hudson's Bay Company's Charter, was in force, as altered by dominion and territorial legislation, until February 15, 1887. But since that date, by virtue of the Dominion Act of 1886 (c. 25) the civil and criminal laws of England in force on July 15, 1870, the date on which the Territories became part of Canada, are now in force, subject to amendments by Imperial, dominion, and territorial legislation. In Manitoba, before July 15, 1870, when the province was constituted, the law of England as it stood in 1670 was the basis of the law. Then came an Act of the provincial legislature in 1874 which declared the law of England, as it stood on July 15, 1870, to be in force in matters of controversy relative to property and civil rights, and as to evidence and procedure. And finally, in 1888, the Dominion Parliament 'for removing doubts' declared (by 51 Vict. c. 33) English law, as it stood on July 15, 1870, to be in force in Manitoba as to matters within the jurisdiction of that Parliament, so far as that law was applicable to the province and was unaltered by Imperial or dominion legislation. A provincial Act of British Columbia, passed in 1871, declared the civil laws of England, as they existed on November 19, 1858, to be in force in the province so far as not from local circumstances applicable.

New South Wales, as it existed on the eve of its absorption into a Federal system, may be taken as the type of a self-governing unfederated colony. Its statutory law is described as consisting of (1) English statutes existing at the time of the occupation of the colony so far as they were applicable to local circumstances; (2) statutes in force within the realm of England at the passing of 9 Geo. IV. c. 83, so far as applicable; (3) enactments of the Imperial Parliament extending to the colony, and any orders and regulations made thereunder and having the force of law in the colony;

Austral-
asian
statute
law.

CH. IX. (4) statutes passed by the legislature of the colony and regulations and by-laws made thereunder; (5) the charter of justice made under the authority of 4 Geo. IV. c. 96; (6) Orders of the Queen (now King) in Council, either of an enacting or regulating character, such as the Order regulating appeals to the Queen (now King) in Council, or applying Imperial enactments, such as the orders under the Extradition Act.

Victoria and Queensland have, besides their own enactments, certain ordinances and statutes passed for New South Wales before their severance from that colony.

South Australia has sent to the Society of Comparative Legislation a long list of Imperial enactments which have been adopted by the local legislature.

Jamaica. The constitution of Jamaica has undergone many vicissitudes, and is now mainly regulated by an Order in Council of May 19, 1884¹ made in pursuance of a Jamaica Act of 1866 and the 'Jamaica Act' passed by the Imperial Parliament in the same year (29 & 30 Vict. c. 12). Its colonists brought with them the English Statute Law of 1655, so far as this law was applicable to the circumstances of the island.

A local Act passed for the Bahamas in 1799 extended specifically 207 English statutes to the colony.

Rudi-
mentary
forms of
legisla-
tion.

Rudimentary forms of legislation are to be found in such places as the West African colonies, Labuan, and the Australasian islands. Thus in Sierra Leone the statutory law consists of local ordinances based on the existing law of England, with adaptation to local circumstances. Labuan is governed by Ordinances of the Governor made under the authority of Letters Patent. In Fiji the statutory law consists of (1) Ordinances passed by the Governor with the advice of his Legislative Council; (2) native regulations (applicable only to Fijians, and, in certain cases, to other Polynesians) passed by the Native Regulations Board and approved by the Legislative Council; (3) Imperial statutes

¹ *Statutory Rules and Orders*, Revised, iv. 290. See also the Orders in Council of June 11, 1866, and October 3, 1895.

applying to the colony, and (4) Orders in Council. A Supreme Court Ordinance (XIV of 1875) declared the English statutes that were in force at the time when the colony obtained a local legislature (Jan. 2, 1875) to be in force in the island so far as they were applicable to local circumstances. Numerous Ordinances have been passed adopting provisions of English Acts.

In British Bechuanaland, before it was annexed to the Cape Colony, the enacted law consisted of proclamations by the Governor.

III. METHODS OF LEGISLATION.

1. *Preparation of Bills.*

The methods adopted for the preparation of legislative measures in British India and in the several British Colonies are various. The most carefully organized system is in India. In most colonies the Attorney-General takes a leading part in the preparation of Bills, and in some colonies official draftsmen are employed.

The Legislative Department of the Government of India India. was, like the office of the Parliamentary Counsel in England, established in the year 1869, and is under the charge of the Law Member of the Governor-General's Council. All legislative measures introduced into the Governor-General's Council are drafted in the Legislative Department. Most of them are introduced into the Council by the Law Member himself, and he is, *ex officio*, chairman of the select committee to which, as a rule, every Bill is referred, so that he is able to keep effective control over the form of a Bill through all its stages. Every Bill is accomplished by a printed Statement of Objects and Reasons, prepared in the Legislative Department. That Department, like the Office of the Parliamentary Counsel in England, is charged with other duties besides the mere drafting of Bills¹.

¹ See the present writer's *Government of India*, p. 181.

CH. IX. The Bengal legislative council has an official draftsman of its own, but the other local legislatures of India depend for the drafting of their measures on their legal advisers with such assistance as it may be practicable to obtain from the Legislative Department of the Government of India.

The following statements, taken from the replies to the questions circulated on behalf of the Society of Comparative Legislation, illustrate the systems adopted in various British Colonies.

Self-governing colonies.

The Dominion of Canada and some of the Australasian colonies will supply illustrations of the procedure in the self-governing colonies.

Canada.

In the Dominion of Canada there is, for each house of the Canadian Parliament, a law clerk, an officer whose duties include those of a parliamentary counsel as well as those of a legislative draftsman. The law clerk of the Senate is appointed by that body. The law clerk of the Lower House, in which the great majority of measures are introduced, is also law clerk of the Government. He is appointed by Mr. Speaker, and has an assistant. The preparation of measures for private members is no part of his business.

Newfoundland.

In Newfoundland there is an official draftsman, called the Law Clerk of the Legislature, appointed by and responsible to the Governor in Council. His duties are to draft all Bills introduced into both Houses of the Legislature, including private bills, but in practice bills are frequently drafted by private members themselves.

New South Wales.

In New South Wales drafts of legislative measures are prepared by the members of Parliament introducing them, or by some person acting under their authority or by their direction. There are two official draftsmen, named Parliamentary draftsmen and appointed by the Governor with the advice of the Executive Council. They are in the department of the Attorney-General and responsible to him. Their duties are :—

1. The preparation of Bills for the Ministers of the Crown.

2. The preparation of Bills for private members on the request of the Attorney-General. CH. IX.
3. Reporting to Ministers on the introduction of any Bill by a private member, and on its passage from the Legislative Assembly to the Legislative Council.
4. Reporting to the Attorney-General at his request on all by-laws and regulations of public bodies submitted to him for his opinion or approval.
5. Reporting on any special matter submitted by any Minister to the parliamentary draftsmen.

In Victoria measures for submission to Parliament are prepared by the parliamentary draftsman under the directions of Ministers. The parliamentary draftsman is an officer of the public service appointed by the Governor in Council, and attached to the department of the Attorney-General, to whom he is directly responsible. His duties are to prepare all Government Bills and draft amendments thereto. He also, when desired, drafts Bills for private members, and, as a general rule, all such Bills, by whomsoever drafted, are examined by him, and, when necessary, specially submitted to the Attorney-General or the Premier for his consideration. Victoria.

In Queensland, drafts of legislative measures are prepared, in the case of Government measures, under the direction of the department concerned, and usually by a member of the bar, under the supervision, if desired, of the Crown Law Office. Measures introduced by private members are usually prepared under their own direction, aid being occasionally given from the Crown Law Office. There is no permanent parliamentary draftsman. Queensland.

In South Australia the drafting of any important measure introduced by the Government is usually entrusted to some legal practitioner chosen either for his special knowledge of the law relating to the subject-matter of the measure, or for his ability as a draftsman. The lawyer so selected takes his instructions from the Minister having charge of the Bill, South Australia.

CH. IX. and receives information and suggestions from the permanent officials of the departments concerned. Measures are frequently drafted under the instructions of the responsible Ministers by the officials by whom the measures will be subsequently administered. There is no official draftsman. It is quite exceptional for a private member to receive any assistance in drafting any measure which he desires to introduce.

Western
Australia.

In Western Australia drafts of legislative measures are prepared by various persons, the Attorney-General, a Minister, or a private member. There is now an official draftsman appointed by the Governor in Council on the recommendation of the Attorney-General, to whom he is responsible. He has no staff, and his duties are indeterminate; they do not extend to measures introduced by private members.

Crown
colonies.

For the Crown colonies, the following illustrations may suffice :—

In Fiji the drafts of legislative measures are generally prepared by the Attorney-General, there being no other official draftsman, though sometimes the various heads of departments, in more or less collaboration with the Attorney-General, may draft subordinate measures of special legislation, referring to their own particular departments. Sometimes, however, the Governor may draft and introduce a measure upon a subject of which he has special cognisance. Fiji being a Crown Colony without any representative Government, the Governor practically initiates all legislation, and it is the duty of the Attorney-General to introduce each measure, with the exceptions above mentioned, so that practically there is little or no legislation introduced by the non-official or private member.

In British New Guinea drafts are prepared sometimes by the Lieutenant-Governor, sometimes by the Chief Judicial Officer. They are approved by the Governor of Queensland before they are submitted as Bills to the Legislative Council.

Passing to the West African Colonies—in Gambia drafts of legislative measures are prepared by the only judicial and law officer in the colony, the chief magistrate. Private or non-official measures which, however, are very rare, must, under the rules of the Legislative Council, be prepared and printed at the expense of the parties interested.

In the Gold Coast drafts of legislative measures are prepared by the Attorney-General and Solicitor-General. There is no official draftsman.

In Lagos the drafts are usually prepared by the King's Advocate, but occasionally other officials draft measures appertaining to their own departments of Government. There is no official draftsman.

In Sierra Leone Bills are prepared by the King's Advocate, who is the official draftsman.

In the Bahamas (West Indies) there is no official draftsman. The Attorney-General, who is appointed by the Crown, and is *ex officio* a member of the Executive Council, drafts Government measures as well as those introduced by private members. He has no staff. The draft official measures are, before introduction in either of the legislative chambers, submitted to the Executive Council, whose constitution is governed by the Royal instructions issued to the Governor, and which consists entirely of official and nominated members.

In Barbados there is no special officer charged with the drafting of Bills.

In Bermuda drafts are prepared by the Attorney-General of Government legislative measures, and of any other measures which he considers it desirable to adopt. There is no other official draftsman. The Attorney-General is appointed by the Crown, and has no official staff. His duties do not extend to measures introduced by private or non-official members of the legislature. Important measures originating with private members are usually brought in by a committee of the House of Assembly, or a joint committee of the Legislative Council and Assembly, appointed for the purpose, with leave to employ counsel, the expense being defrayed out of the public treasury.

In Grenada drafts are prepared by the Attorney-General or by some other member of the Government.

In British Guiana there is no special official draftsman. It is a part of the duties of the Attorney-General to draft and carry through the Legislative Chamber all Government measures. In practice these are almost co-extensive with measures of a public nature. A private or non-official member has the right, with the permission of the Governor, to introduce a Bill relating to a matter of public importance; but this right is seldom or never exercised. In the case of a private Bill, the Attorney-General is expected to examine, and, if necessary, to revise it, in the interests both of the Government and of the Legislative Chamber. Where a measure deals with matters falling specially within the experience of a public department or officer, the first draft is sometimes made by the department or officer, and then settled by the Attorney-General.

In British Honduras the Attorney-General of the Colony drafts all Bills. He has no staff.

In Jamaica, Government measures are drafted by the Attorney-General, but in the event of his being unable for any reason to do so the Clerk of the Legislative Council drafts them. Each has

CH. IX. a clerk, whose duties are entirely clerical. Their duties do not
 . — extend to measures introduced by private or non-official members
 of the Legislative Council.

In the Leeward Islands the Attorney-General and two assistants are the official draftsmen of the Government Bills.

In St. Lucia the Attorney-General prepares drafts of legislative measures and is the only draftsman. Measures introduced by private or non-official members of the legislature are prepared by themselves or by counsel on their behalf.

In St. Vincent drafts of legislative measures are prepared by the Attorney-General, who is appointed by the Crown.

In Trinidad and Tobago drafts of legislative measures are prepared by the Attorney-General, who is the official draftsman, and is appointed by and responsible to the Crown. His duties do not extend to measures introduced by non-official members of the Legislative Body.

In Gibraltar drafts of legislative measures are prepared by the Attorney-General of the Colony, who is the official draftsman appointed by the Secretary of State for the Colonies, and is responsible to the Governor. His staff consists of one clerk.

In Ceylon drafts of legislative measures are prepared by the Attorney-General.

In Hong Kong drafts of legislative measures are prepared by the Attorney-General, who has no official draftsman or staff to assist him. His duties do not extend to measures introduced by private or non-official members of the Legislative Council, but such measures are in practice always referred to him for his report, and he suggests such amendments as he considers the Government ought to require.

In Labuan drafts of legislative measures are prepared by the Governor. There is no official draftsman, and there has never been any law officer.

In the Straits Settlements drafts of legislative measures are prepared by the Attorney-General. He is appointed by the Secretary of State and responsible to the Governor. He is allowed clerical assistance. He is an official member of the Legislative Council, and introduces and supports measures proposed by the Government. His duties do not extend to measures introduced by non-official members.

In the Seychelles, a dependency of Mauritius, there is no official draftsman. There being no Attorney-General or other law officer of the Crown, the drafts of legislative measures are generally prepared by the judge, who is the only legal and official member of the Executive and Legislative Councils. In some instances drafts are prepared by the heads of departments which they specially concern, but in that case they are submitted to the judge for examination before introduction. Non-official members prepare their own drafts.

2. *Publication of Bills.*

In British India, a Bill when introduced into the Legislative Council is published in the Official Gazette, in English and in the local vernacular, with a 'Statement of Objects and Reasons,' and a similar course is usually adopted after every subsequent stage of the Bill at which important amendments have been made. Thus a Bill as amended in committee is published with the report of the committee explaining the nature of, and reasons for, the amendments. The draft of a Bill is in some cases published, for the purpose of eliciting opinion, before its introduction into the Council.

CH. IX.
India.

In the self-governing colonies the English practice is adopted of printing a Bill, after first reading, and at subsequent stages, as part of the proceedings of the House.

Self-governing colonies.

In most, but not all, of the Crown colonies drafts of Bills are published for general information in the local Official Gazette.

Crown colonies.

3. *Stages of Bills.*

Under the rules for the conduct of legislative business in the Council of the Governor-General of India¹, when a Bill is introduced, or on some subsequent occasion, the member in charge of it is to make one or more of the following motions:—

- (1) That it be referred to a select committee; or
- (2) That it be taken into consideration by the Council, either at once or on some future day to be then mentioned; or
- (3) That it be circulated for the purpose of eliciting opinion thereon.

The usual course is to refer a Bill after introduction to a select committee. It is then considered in Council after it is returned by the committee, with or without amendments, and is passed, either with or without further amendments made in Council.

¹ See *Government of India*, pp. 330, 331.

CH. IX. In most of the colonies a Bill passes through the same
Colonies. stages as in the British Parliament, introduction, first
reading, second reading, reference to a committee, either
select or of the whole House, third reading, and passing.
But in some of the Crown colonies these stages are dispensed
with or abbreviated.

4. *References on Points of Form.*

There does not appear to be any machinery in any colony for referring a Bill on points of form to any particular officer or authority. In some cases it is said that the Attorney-General is responsible for a Bill being correct in point of form. But a popular legislature would object to any interference by an official authority.

5. *Uniformity of Style.*

Provision was made for uniformity of language by an Act of 1850 (13 & 14 Vict. c. 21), commonly known as Brougham's Act, now repealed and superseded by the Interpretation Act, 1889 (52 & 53 Vict. c. 63). Similar enactments are in force in British India (the General Clauses Act, 1897) and in most of the British colonies, and in some of the Crown colonies directions to observe uniformity in language, style and arrangement are embodied in the official Instructions to the Governor.

6. *Legislative Sessions.*

India. In British India there are no regular sessions of the different legislatures, but the legislature meets when summoned for the transaction of business. The Governor-General's legislative council usually holds a weekly sitting during the Calcutta session, and meets at less regular intervals during the Simla session. It may, but in practice does not, sit elsewhere.

Self-
governing
colonies. In the self-governing colonies the constitution usually requires a session of the legislature to be held once in each year, but the date and duration of the session is fixed by custom

and by the needs of the year. The Dominion Parliament of Canada usually meets in January, February, or March, and the average length of the session has, since 1867, been about ninety days. In Victoria the Houses meet, as a rule, in May or June and prorogue before Christmas, but the session occasionally extends into the new year. In Queensland the legislature usually meets in May or June and sits till November or December. In South Australia the session is usually from the beginning of June till a few days before Christmas. In Western Australia it usually lasts from July to November.

In the Crown colonies there are, as a rule, no regular sessions, but the legislative body meets when summoned. Practice, convenience, or local rules, may however require periodical sittings at particular times of the year. In Ceylon, for instance, it is customary to open the session two or three months before the end of the year, and to close it shortly before the commencement of the next session.

7. *Numbering and Short Titles of Laws.*

In British India, and in most, if not all, of the Crown colonies the enactments of each calendar year are numbered in a consecutive series (1, of 1900, &c.), but in some colonies the introduction of this practice is of recent date.

Some of the self-governing colonies retain the cumbrous English practice of numbering by reference to the regnal year (63 & 64 Vict. c. 1, &c.), but the practice varies. Thus in the Parliament of the Dominion of Canada Acts of Parliament are distinguished by the regnal year, and are numbered, but in drafting, since 1892, the practice has been to cite an Act by the calendar year, 'c. 20 of the Statutes of 1894.' In New South Wales, Queensland, and Western Australia, Acts are distinguished by the regnal year and numbered (60 Vict. No. 24)¹. In South Australia, from 1837 to 1844 the

¹ The Victorian statutes were consolidated in 1890, and the Victorian Interpretation Act (No. 1058) provides that the Acts of the Parliament of

CH. IX. Ordinances were numbered in a series by reference to each regnal year. From 1844 to 1874 there was a numbered series for each calendar year. Since 1875 public Acts have been numbered in Arabic figures in one continuous arithmetical series, beginning with No. 1. Both the regnal and the calendar years are printed at the commencement of each Act.

The practice of giving every law a short title for convenience of citation prevails almost everywhere, and several colonies have passed laws corresponding to the English Short Titles Act, 1896, and conferring short titles on previous laws.

8. *Private Bill Legislation.*

Self-governing colonies.

The self-governing colonies appear to follow generally, and to embody in the standing orders of their legislatures, the principles and practice of the British Parliament with respect to Private Bill legislation; but the modern English system of numbering local Acts separately, and embodying them in volumes distinct from those which contain the general Acts, does not seem to have been generally adopted.

Thus, in the Canadian Parliament, a private Bill must pass through the same stages as a public Bill; but, besides, public notice by advertisement must be given of the intention to introduce it, it must be based on petition, and it is referred to a select committee after its second reading. The distinction observed in Canada between private and public Bills is, broadly stated, that the latter affect the general interests of the community or involve considerations of public policy. Private Acts are not numbered separately, but consecutively, after the public Acts of the Session. In the Australian colonies the procedure on private Bills is based upon and is practically identical with that of the British House of

Victoria shall be numbered in regular arithmetical series, and that it shall be sufficient to cite any such Act by the number alone, without setting out the title thereof, or the year of our Lord, or of the reign in which the Act is passed.

Commons. The returns from South Australia describe private Bills as being those:— CH. IX.

- (1) Whose primary object is to promote the interests of individual persons or corporations rather than those of the community at large; or
- (2) Which authorize the taking compulsorily or pre-judicially affecting, by individual persons or corporations, of lands other than Crown lands; or
- (3) Which authorize the granting of specific Crown Lands to an individual person, corporation, or local authority.

Bills coming within the last two categories (2 & 3), if introduced by the Government, are not treated as private Bills, but must after the second reading be referred to a select committee of that House in which they originate. Up to the end of 1851, private Acts were numbered among the public Acts in the order in which they became law. Since that time they have not received numbers, and are for convenience grouped at the end of each year in the official volumes of Acts published.

In British India there is no special provision for Private India. Bill legislation. Most of the matters dealt with by private Bills in England form the subject of executive action in India.

For similar reasons Private Bill legislation is scanty in the Crown colonies, and the information about this class of legislation is consequently meagre.

In the Straits Settlements the instructions to the Governor direct that no private Ordinance shall be passed whereby the property of any private person may be affected, without a saving of the rights of the Crown, or of all bodies public and corporate, and of other persons except such as are mentioned in the Ordinance and those claiming by, from, or under them, and that the Governor shall not assent until proof is made before him that adequate and timely notification by public advertisement was made of the parties'

CH. IX. intention to apply for the Ordinance. And a certificate under the Governor's hand is to be annexed to the Ordinance signifying that the assent is to be given. The Standing Orders of the local legislature also provide that any person whose interests may be affected by a Bill may apply by petition to the Council to be heard by himself or counsel, and to have witnesses examined on the subject of the Bill.

Similar instructions and rules appear to be in force in some of the other Crown colonies, but in most of them it has not been found necessary to make any special provision on the subjects, or to provide for the separate numbering or publication of local or private Acts, when passed.

9. *Explanatory Statements.*

The practice of accompanying a Bill with an explanatory statement of objects and reasons, which is universal in British India, is followed in one or two of the Crown colonies, but does not appear to be common, although it may be adopted in exceptional cases.

IV. PUBLICATION OF STATUTES.

1. *Current Legislation.*

India. In British India, every Act when passed is published in the Gazette of India, or in the local official Gazette, or in both, in English and in the local vernacular, and is also published separately in an octavo form by the Government Printers, and a copy so published is evidence of its contents. Regulations made under the Government of India Act, 1870, are published in a similar manner. At the beginning of each calendar year the Acts passed by the Governor-General in Council during the previous year are published in an octavo volume, with a table of contents and an index. The number of Acts passed by the local legislatures does not always justify the publication of a separate annual volume. Copies

of Acts and Regulations are distributed to judges and other officials. CH. IX.

The system which prevails in the self-governing colonies may be illustrated by the returns which have been received from Canada¹, Victoria, and South Australia.

In Canada, an Act comes into force on the day it is assented to in His Majesty's name, unless some later date is provided in the Act. Evidence of an Act having been duly passed may be either (1) by the certificate of the Clerk of the Parliaments, who has the custody of the originals, or (2) by the imprint of the King's Printer. Public Acts of general utility are printed in the Canada Gazette, by the King's Printer, by order of the Governor in Council, immediately after they have received the Royal assent. The Acts of each session are also printed in a collected form by the King's Printer at the end of each session; one volume containing the public Acts, together with such Orders in Council and proclamations or other documents, and such Imperial Acts, as the Governor in Council directs; the other volume containing the local and private Acts. Each volume is indexed and has a table of contents; and since 1892 the effects on previous legislation are shown.

In Victoria the statutes of each session are published in one volume at the end of that session. This volume is accompanied by a table of contents, but not by an index or table showing the effect on previous legislation. It has, however, been the practice during the last few years to publish at the end of each sessional volume an alphabetical index to Acts passed since the consolidation of 1890². This serves as a useful guide to amending legislation. The latest sessional volume also contains a chronological table of all the Victorian Acts, showing how they have been affected by subsequent legislation.

In South Australia, under the Standing Orders of the

¹ The replies from Canada relate only to Dominion Acts.

² See below, p. 195.

CH. IX. respective chambers, four copies of every Bill when it has finally passed both Houses are duly certified and verified by the President or Speaker and the clerk or other proper officer of the House in which it originated, and presented to the Governor. The Governor affixes his assent to all the copies, and returns one copy to each House to be placed with its records, enrolls one copy in the Supreme Court, and transmits one copy to the Secretary of State for the Colonies. In practice, two extra copies are presented to the Governor, one of which is retained in his office, and the other sent as a duplicate to the Secretary of State for the Colonies. The certificate of the clerk, or other proper officer of the House, to the effect that the document to which it is attached is a true copy of any colonial law assented to by the Governor, is prima facie evidence of the truth of the copy, and that the Act has been properly passed and assented to. Acts purporting to be printed 'by authority by the Government printer' are never questioned. Both public and private Acts are printed separately by the Government Printer 'by authority' in demy quarto, in pica type, and are sold to the public at the uniform price of one shilling each. Occasionally, an Act is printed also in demy octavo size, in long primer type, for distribution or for use in Government departments. The separately-printed public and private Acts are collected into volumes at the end of each session, and sold at the price of a shilling for each Act in the volume. These periodical volumes are accompanied by (1) an index of the Acts in alphabetical order of the subject-matter (given since 1879), and (2) a table of contents setting out the letter of the Acts in their numerical order.

Crown colonies.

In the Crown colonies Ordinances and other enactments are promulgated by publication in the Government Gazette, and separate copies are published and sold by the Government Printer. Provision is usually made for the deposit of verified and authenticated copies with certain public authorities, such as the Registrar of the Supreme Court. In some

cases the Ordinances of each year are printed in a collected form after the end of that year, and the volume thus formed may or may not be accompanied by a table of contents or an index. In some colonies the amount and importance of the year's legislation is not sufficient to justify the publication of an annual volume, and one is not surprised to learn that in British New Guinea the Government printing staff and appliances are very limited. CH. IX.

The shape in which the enactments of the different colonies are published is not uniform. In New South Wales the statutes are, or were recently, printed in folio form, in South Australia in demy quarto, in British Guiana in quarto, and in some of the West African colonies in foolscap sheets. It would be greatly for the convenience both of librarians and of those who have to consult and compare Colonial statutes if the Colonial Governments could agree upon some uniform style of publication, such as the octavo volumes in which the Acts of the Imperial Parliament are now contained ¹. Variations
in size of
volumes of
Colonial
statutes.

2. *Collective and Revised Editions.*

The statute law of British India is to be found mainly in India. three sets of volumes :—

1. An edition, in two volumes, of the Imperial statutes applying to India.
2. An edition, in six volumes, of the Acts of the Governor-General in Council, brought down to the end of 1898.
3. A set of local codes, one for each of the eleven provinces of British India ², and containing (a) the old Regulations so far as they are in force in that province, (b) Acts passed for the province by the

¹ See the note on the size of Colonial statutes at p. 187 of vol. ii (New Series) of the *Journal of the Society of Comparative Legislation*.

² Bengal, Madras, Bombay, North Western Provinces and Oudh, Punjab, Burma, Assam, Central Provinces, Ajmere, Coorg, and Baluchistan.

CH. IX.

Governor-General in Council, (c) Regulations made under the Government of India Act, 1870 (33 Vict. c. 3), and applying to the province or some part of it, and (d) Acts of the local legislature, if any.

All these volumes are periodically revised and brought up to date by the Legislative Department of the Government of India, but have to be supplemented by the Acts or Regulations passed since the date of the latest edition. They were preceded, and made possible, by a series of repealing and consolidating Acts, the most important of which were prepared and passed when Mr. Whitley Stokes was secretary of the Indian Legislative Department.

Self-governing colonies.

Much activity has been displayed, especially during recent years, both in the self-governing and in the Crown colonies, in the revision of the local statute law, and its presentation in a collective and convenient form.

Canada.

The Revised Statutes of the Dominion of Canada were prepared by commissioners appointed by the Dominion Government, and came into force on March 1, 1887. Their contents are arranged as follows: constitution and political rights; executive government and public offices; public departments; trade and commerce; companies and corporations; administration of justice. The whole of the statute law of the Dominion is to be found in these Revised Statutes, as supplemented and amended by the sessional volumes of subsequent date.

Some of the Canadian provinces have recently been taking steps for the revision and consolidation of their statutes. Ontario brought a set of Revised Statutes into force in 1897. British Columbia passed a Revised Statutes Act in 1895 (c. 80) providing for the appointment of Commissioners to revise and consolidate the provincial laws of the province, and the statute law of England applicable to the province. All Acts and proclamations which had expired or had been repealed, and the schedules of repealing Acts, were to be omitted. The Commissioners were directed to revise and

alter the language 'so as to give better effect to the spirit and meaning of the law,' and a comprehensive index was to be added. Acts of 1897 (c. 41) and 1898 (c. 40) make further provisions on the same subject. Nova Scotia passed an Act in 1898 (No. 6) authorizing the appointment of Commissioners to revise and consolidate the public Acts of the province in suitable form for presentation to the legislature by the end of the year. The Ordinances for the North West Territories were revised in 1898.

CH. IX.

In Newfoundland the whole statute law of the colony has been twice consolidated, first in 1872, and since then in 1892. Each consolidation operated as a repeal of all previous and separate statutes.

The whole of the Victorian statutes were consolidated in 1890, under the personal supervision of the late Chief Justice Higinbotham. A complete edition of the statute law of Victoria was then issued in seven volumes, of which the first five contained the consolidated Acts; the sixth, Acts of a private character; and the seventh, Acts of the Federal Council of Australasia, and Acts of the Imperial Parliament believed to be in force in Victoria. This edition was intended to form part of a scheme which was suggested to Parliament by the Council of the Judges, in their annual report in 1887, for the periodical consolidation and publication of the statutes. The suggestion was referred to a committee of both Houses; which in November, 1889, reported favourably to the project of consolidation, and recommended that a fresh consolidation and publication should take place every ten years. During the session of 1890 the whole of the consolidated Acts, which had been prepared by the late Chief Justice with the assistance of two members of the Bar, were passed into law. In the course of consolidation all matter clearly repealed (with the exception of some sections in the Constitutional Act) was omitted. In accordance with the suggestion of the Council of the Judges, notes upon decisions were made a feature of this publication. The consolidated Acts are

CH. IX. arranged alphabetically and numbered consecutively. An explanatory paper and historical table of legislation are prefixed to the first volume.

In New South Wales a collection of public statutes was compiled in 1879 by Mr. Oliver, then parliamentary draftsman to the Government, and was published by the authority of the Government. It is in three volumes, of which two contain the statutes in force at the time, arranged in alphabetical order, whilst the third volume contains a chronological table and index. A Statute Law Revision Act of 1898 (No. 28) removed some 600 obsolete enactments from the Statute Book.

In Queensland an edition of the statute law was brought out by Messrs. Pain and Woodcock in 1889, at the expense and by the authority of the Government. The contents are arranged alphabetically as to subjects, and chronologically as to the statutes dealing with the same subject. A separate volume contains some of the more important Imperial statutes applying to the colony.

In Western Australia a revised edition in chronological order of the laws in force, exclusive of those relating to appropriation and supply, with a chronological table, was edited by Mr. Justice J. C. H. James, of the local Supreme Court, and was published in 1896 under the authority of the Government.

New
Zealand.

New Zealand, by the Reprint of Statutes Act, 1895, provided for the appointment of Commissioners with directions

- (1) To prepare and arrange for publication an edition of the Public General Acts of the colony ;
- (2) To revise, correct, arrange and consolidate these Acts, omitting all such enactments and parts thereof as are of a temporary or local and personal nature, or have expired, become repealed, or are spent; and
- (3) To omit all formal and introductory words and all repealing enactments, and to make such alterations as are necessary to reconcile the contradictions,

supply the omissions, and amend the imperfections of the existing Acts. CH. IX.

They were to report

- (a) The contradictions, omissions, and imperfections appearing in the existing Acts, and the mode in which the Commissioners had dealt with them ;
- (b) The Acts which they thought should be repealed, with their reasons and recommendations as to any new enactment which they might think necessary ;
- (c) Acts or Bills of the Imperial Parliament which, from their general interest and importance, they might think should be adopted for the colony.

In their reports they were to indicate new matter in different type from that showing the existing law on completion of the revision, and, on consolidation of the Acts relating to any separate branch of the law, a copy was to be sent to the Governor, who might submit the report with the draft Acts to the legislature, for enactment if it thought fit.

It will be seen that the powers entrusted to the New Zealand Commissioners for the revision and improvement of the statute law are much wider than any which were exercised by the authorities under whose directions Statute Law Revision Acts and editions of Revised Statutes have been prepared in England. No action has, however, as yet been taken under the New Zealand Act.

The returns to the Society of Comparative Legislation show that in a great many of the Crown colonies much labour has, during recent years, been bestowed on the revision of the local statute law. In Gibraltar the laws were, in 1890, revised and re-enacted in a consolidated form ; but in most colonies revision has, as in England, taken the form of republication of existing Acts, with the omission of spent and obsolete matter, a process which is usually preceded by a good deal of work in the way of consolidation and repeal. The list appended to this chapter, for which I am indebted

CH. IX. to the Librarian of the Colonial Office, will show the nature of the work which has been done in this direction, and may be a useful guide to those who are in search of Colonial statutes.

3. *Indexing.*

Suggestions for uniformity of indexing.

The compilation of a general index to all the enactments in force in the different parts of the British Empire would be a work of enormous labour and doubtful utility. What seems desirable and practicable is that the statute law of each colony and dependency should be indexed on a common principle, and that the indexes should be periodically revised and brought up to date. Each annual volume of enactments might be accompanied by an alphabetical index and tables of the same nature as those attached to the annual volumes of English statutes. And there ought to be for each colony and dependency (1) a chronological table of enactments and (2) an alphabetical index, framed on the same lines as the chronological table and index now annually published in England under the directions of the Statute Law Committee. The table and index ought to be periodically revised. If this plan were adopted it would be comparatively easy to find out what statute law is in force on any given subject in any particular colony. A good deal has been done in this direction in different parts of the Empire, either under the authority of the Government or by private enterprise, but the systems adopted are different, and the returns received by the Society of Comparative Legislation showed that for some colonies there was no general index in existence.

Existing indexes in India and elsewhere.

The latest edition of the Index to the enactments relating to India was published in 1897 under the direction of the Legislative Department of the Government of India, and is modelled on the lines of the English Chronological Table and Index. There is also an alphabetical index to the contents of the annual volumes of Acts of the Governor-General in Council.

The Index to the enactments of New South Wales appears

to have been brought out by private enterprise. The fifth volume of the 1890 edition of the Victorian Consolidated Statutes contains a complete index to the Consolidated Acts, arranged on the same principles as the index to an ordinary textbook. In Queensland there is an index to the volumes of statutes edited by Messrs. Pain and Woodcock under the authority of the Government. In Western Australia a general index to the statute law of the colony, arranged under alphabetical heads, is revised annually at the end of each Parliamentary session, and bound up with the volumes of statutes for the year. The work of revising this index is done gratuitously by Mr. Justice J. C. H. James, of the local Supreme Court.

V. CONSOLIDATION AND CODIFICATION.

The Revised Statutes of Canada and such enactments as the Gibraltar Laws Ordinances of 1890 embody attempts to present the whole statute law of a colony in a collective form, arranged on some general plan. The importance of taking steps from time to time to consolidate into a single Act the scattered enactments relating to a particular branch of law has been recognized, not only in British India, but in most of the colonies.

In British India Mr. Whitley Stokes' tenure of office, first as secretary to the India Legislative Department, and then as Law Member of the Governor-General's Council, was marked by the passing of a large number of consolidating Acts, which materially reduced the bulk and simplified the form of the Indian Statute Book. Much activity in the same direction has recently been displayed in some of the self-governing colonies. For instance, New South Wales recently appointed a committee to take steps for consolidating the statute law of the colony, and the large number of consolidating Acts which were passed by the colony in 1898 were doubtless the result of their labours. In Queensland

CH. IX. twenty-nine consolidating Acts were prepared in 1869 under the supervision of Sir James Cockle, the Chief Justice, and the work of consolidation has been continued by the present Chief Justice, Sir Samuel Griffiths. Reference has been made already to the steps which were taken in New Zealand in 1895 for revising and consolidating the local statute law. Similar steps have been taken in many of the Crown colonies, either through the agency of Commissions or Committees, or at the instance or under the supervision of the Chief Justice or Law Officer.

In codification, as distinguished from the less ambitious work of consolidation, British India, as is well known, takes the lead¹. The laws commonly known as the Indian Codes are the Penal Code, the Codes of Criminal and Civil Procedure, the Evidence Act, the Contract Act, the Succession Act, the Specific Relief Act, the Negotiable Act, the Indian Trusts Act, the Transfer of Property Act, and the Councils Act. None of the self-governing or Crown Colonies can approach this record. But Canada has a Criminal Code of 1882, based on the English draft code of 1880, on Sir James Stephen's Digest of the Criminal Law, and on the Canadian Statutes. New South Wales has a Criminal Code of 1883, Victoria has a Crimes Act of 1890, New Zealand a Criminal Code Act of 1893, and the Criminal Code framed for Queensland mainly by Sir Samuel Griffiths came into force at the beginning of 1900. Four of the Crown Colonies, St. Lucia, St. Vincent, British Honduras, and the Gold Coast, have adopted, with modifications, the Criminal Code which was prepared in 1877 by Mr. R. S. (now Mr. Justice) Wright for Jamaica, but which never became law in that island. Ceylon and the Straits Settlements have a Penal Code based on the Indian Penal Code. Quebec has two Codes, prepared by Commissioners, a Civil Code which came into force in 1866, and a Civil Procedure Code which came into force in 1867. The Civil Code embodies the laws of Lower Canada (now

¹ See Ch. VIII.

Quebec) in civil matters, laws which were mainly the old *Coutume de Paris* modified by provincial statutes or by the introduction of portions of English law. A former Canadian chief justice has endowed the island of St. Vincent with a Civil Code, based on the law of Upper Canada. Ceylon has a Penal Code, Codes of Civil and Criminal Procedure, and an Evidence Ordinance, based on the corresponding Indian Codes. The little island of Grenada in 1897 passed an Evidence Code, with illustrations after the Anglo-Indian fashion, a Criminal Code and a Code of Criminal Procedure. Several of the Crown colonies have what are substantially codes of procedure under some such title as a Supreme Court Ordinance. Mauritius and the Seychelles have a Mauritius Penal Code, in addition to the four French codes in force in the island. And finally a large number of the colonies have adopted some or all of the three codifying Acts which have been passed for England, the Partnership Act, the Bills of Exchange Act, and the Sale of Goods Act.

Victoria at one time contemplated a very comprehensive scheme of codification, but seems to have subsequently abandoned it. Some years ago a general codification of the law of Victoria was prepared by Dr. Hearn, Dean of the Faculty of Law in the University of Melbourne, and a member of the Legislative Council. In 1884 a Bill embodying the main features of this codification was passed by the Legislative Council, but subsequently lapsed. In 1887 the code was referred to a joint committee of the two Houses, which took the evidence of some of the judges and leading lawyers as to the advisability of adopting it. The late Chief Justice Higinbotham and Mr. Justice Webb, amongst others, expressed themselves as favourable to its adoption. In 1888 the Code was again referred to a select committee of the two Houses; but although the Chief Justice again favoured its adoption, there was a large body of testimony the other way. The committee ultimately reported that the Bill contained too many inaccuracies to



CH. IX. be adopted in the form proposed, and they recommended its submission to the best available counsel for revision and correction. Since then nothing has been done in the direction of a general codification of the law, but the three English codifying Acts, mentioned above, have been adopted in the colony.

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¹ See above, pp. 197, 198.

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CHAPTER X

PARLIAMENT AS A LEGISLATIVE MACHINE

См. X.
Napoleon on Legislatures.

'No one,' Napoleon is reported to have said, 'can have greater respect for the independence of the legislative power than I: but legislation does not mean finance, criticism of the administration, or ninety-nine out of the hundred things with which in England the Parliament occupies itself. The legislature should *legislate*, i.e. construct grand laws on scientific principles of jurisprudence, but it must respect the independence of the Executive as it desires its own independence to be respected. It must not criticize the Government, and, as its legislative labours are essentially of a scientific kind, there can be no reason why its debates should be reported¹.'

Napoleonic theory and English practice.

It would be difficult to sum up more concisely the essential differences between a legislature as conceived by Napoleon, and the legislatures which exist in the United Kingdom and in the self-governing colonies. The English legislature was originally constituted, not for legislative, but for financial purposes. Its primary function was, not to make laws, but to grant supplies. Under the modern system, it indirectly appoints the Executive by limiting the selection of a Prime Minister to the persons who can command a majority in the popular House. It has the last word in finance. It criticizes and controls the Administration at every step. Its legislative labours are not essentially of a scientific kind. It has

¹ Quoted by Sir J. Seeley, *Introduction to Political Science*, p. 216, from a letter addressed by Napoleon to Sieyès. I have been unable to find this letter, and I doubt whether it exists, but the quotation is an accurate summary of opinions which Napoleon is known to have expressed.

never constructed, it never will construct, great codes. Its legislation is of a severely practical order. What it does, what it has done for the last 600 years, is to remove discontent, and to avert revolution, by making laws which adapt the political, administrative, and economical arrangements of the country to the requirements of the times. Its success in so doing is the test by which it should be tried.

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The characteristics of English legislation cannot be understood unless three points are carefully borne in mind :—

Leading characteristics of English legislation.

- (1) The kind of laws with the making of which Parliament is mainly concerned are not the kind of laws about which jurists are in the habit of speaking and writing.
- (2) The Executive Government of the United Kingdom exercises greater control over legislation than probably the Executive Government of any other country with popular institutions.
- (3) Englishmen prefer to be governed (if they must be governed) by fixed rules rather than by official discretion.

When the authors of books on jurisprudence write about law, when professional lawyers talk about law, the kind of law about which they are usually thinking is that which is to be found in Justinian's Institutes, or in the Napoleonic Codes, or in the new Civil Code of the German Empire, that is to say, the legal rules which relate to contracts and torts, to property, to family relations, to succession and inheritance, or else the law of crimes as it is to be found in a Penal Code. They would include also the law of procedure or 'adjective law,' to use a Benthamic term, in accordance with which these substantive rules of law are administered by the courts. These branches of law make up what may perhaps be called 'lawyers' law.' Now, as has been pointed out in Chapter I, no legislature in the world has asserted more continuously, more trenchantly, or more effectively, its supremacy over every branch of the law than the British

Parliament mainly concerned with administrative law.

CH. X. Parliament. It has indirectly altered the common law rules of contract, of tort, of property, of marriage, of inheritance. It has recast the law of crimes and criminal procedure, not artistically or completely—indeed, very much the reverse—but sufficiently to give effect in substance to almost all the reforms which Bentham was advocating a century ago. It has remodelled the constitution as well as the procedure of the courts. It has never hesitated to do these things. But at the same time it has never considered the doing of them to be its main function. The bulk of its members are not really interested in technical questions of law, and would always prefer to let the lawyers develop their rules and procedure in their own way. The substantial business of Parliament as a legislature is to keep the machinery of the State in working order. And the laws which are required for this purpose belong to the domain, not of private or of criminal law, but of what is called on the Continent administrative law. Take up a file of the public Bills for a session, or an annual volume of the public general statutes, and it will always confirm this statement. There will usually be a sprinkling of measures or proposed measures which, to use the language of legal journals, ‘are of special interest to the legal profession,’ but the proportion which these bear to the whole mass of Acts and Bills will be extremely small. The bulk of the Statute Book of each year will usually consist of administrative regulations, relating to matters which lie outside the ordinary reading and practice of the barrister. This has probably always been a characteristic of English legislation, but it has been so in a marked degree during the period which has elapsed since the Reform Act of 1832.

There have been three great constructive periods of English legislation—the Edwardian period, which laid the foundations of our political and judicial institutions; the Tudor period, which came after the close of feudalism and at the beginning of the ‘new monarchy,’ which strove to give effect to the ideas of the Renaissance and the Reformation, which dealt

vigorously and unsparingly with the mediæval church, and undertook the responsibility of discharging, through the secular State, functions which had previously been considered to belong to the domain of the Church; and, lastly, the period which followed the Reform Act of 1832, the period in which Englishmen first began to realize the potentialities of the modern State, with its numerous, complex, and far-reaching functions, which began by remodelling the poor law and the municipal corporations, and which has completely transformed the administrative system of the United Kingdom. It is almost impossible to emphasize too strongly the enormous change which the Reform Act of 1832 introduced into the character of English legislation, or the complete contrast between the legislation which preceded and the legislation which followed that date. The eighteenth century and the first two decades of the nineteenth century were indeed prolific of legislation, though mostly of an ephemeral character. The Parliament of the eighteenth century passed many laws, which would now be classed as local Acts, for authorizing the construction of railways, canals, and bridges, and the enclosure of common lands, and was never tired of regulating, after its lights, the conditions of labour, the conduct of trades and industries (e.g. the manufacture of hats and buttons), and the relief of the poor. But it created no new institutions. The justice of the peace was the Alpha and the Omega of its simple system of local government, and most matters of rural importance could be settled in Squire Allworthy's justice-room.

Take up a volume of the eighteenth-century statutes, and compare it with a volume of the Victorian period, and you will find yourself in a new world. In the eighteenth century there was no Local Government Board, no Board of Education, no Board of Agriculture, and the duties of the Board of Trade were almost nominal. Nor were there county councils, district councils, or parish councils. The municipalities were close, corrupt, irresponsible corporations, existing for the benefit of

CH. X. their members, and not of the local public. The functions, both of the central and of the local authorities, were comparatively few and simple. There were no railways, and no limited companies. Gas and electricity had not been utilized. Parliament concerned itself little or not at all with educational or sanitary questions, and factory legislation was a thing of the future. Industry was indeed regulated, but mainly in a paternal fashion by justices of the peace. In a great part of the country such local administration as was required was exercised by justices, and the numerous laws which were passed in the eighteenth century for conferring on them additional powers, though often intolerably prolix, were comparatively simple.

The shifting of the centre of political gravity after the Reform Act of 1832, the enormous strides of scientific discovery, commercial enterprise, and industrial activity, the new problems presented by the massing of great numbers in towns and factories under artificial conditions, the awakened interest in the moral, mental, and material welfare of the working classes, involving demands for enlargement of the functions both of the central and of the local government—all these causes have materially altered the character and increased the volume of Victorian legislation. New authorities have been created with new duties, new powers, and new areas. And care has not always been taken to fit the new system into the old, or to harmonize with each other the functions of co-existing authorities. Hence the chaos of rates, areas, and authorities with which we are all familiar and which has not been abolished, though it has been to some extent reduced, by recent local government legislation.

The net result of the legislative activity which has characterized, though with different degrees of intensity¹, the period since 1832, has been the building up piecemeal

¹ Lord Palmerston's last Ministry (1859-66) was a period of exceptional barrenness in legislation; Mr. Gladstone's first Ministry (1868-74) was a period of exceptional fertility. The former preceded, the latter followed, the Reform Act of 1867.

of an administrative machine of great complexity, which stands in as constant need of repair, renewal, reconstruction, and adaptation to new requirements as the plant of a modern factory. The legislation required for this purpose is enough, and more than enough, to absorb the whole legislative time of the House of Commons, and the problem of finding the requisite time for this class of legislation increases in difficulty every year, and taxes to the utmost, if it does not baffle, the ingenuity of those who are responsible for the arrangement of Parliamentary business.

Now enactments of this kind belong to the sphere of administrative law. For lawyers' law, Parliament has neither time nor taste.

The second leading characteristic of English legislation is the control exercised over it by the Executive Government.

Control of
Executive
Govern-
ment over
legisla-
tion.

Legislation through a popular assembly has always been a formidable problem. Mr. Bryce¹ has indicated the three most important forms of solution which have been attempted. The Executive may present laws to the assembly for acceptance or rejection. This was the method of the Roman republic. The legislative assembly may delegate the elaboration of the laws to committees of its own body. This is the American method and is also the method adopted by the legislatures of most Continental countries. The popular assembly may leave a large share in the initiative and in the shaping of its laws to those members of its own body who are members of the Executive Government. This is the English method.

The Parliament of the present day has largely reverted *in substance* to the practice of the Parliament of the first Edwards, under which the king, by his Ministers, made the laws. In substance, but not in theory or form. Legislation cannot be initiated except by a member of Parliament, and every member of Parliament has a right to initiate legislation. When a Minister introduces a Bill, he does so, not as such,

¹ *American Commonwealth*, part i, ch. xv.

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but as a member of the House to which he belongs. There is no difference in form between a Bill introduced by a Minister and a Bill introduced by any other member. There is no body like the Scottish Lords of Articles, or the French Conseil d'État under the Imperial régime, whose approval is required for a project of law. Nor will Parliament brook any outside interference with the shape of a legislative measure, either while the measure is before it, or after the measure has been passed. The Government of the day may disapprove of a measure which has been introduced, or may desire the passage of a measure of its own, but in either case it rests with Parliament to say whether the measure shall become law or not. And so with amendments. The Government may wish to make an amendment, or may object to an amendment which has been made, but it is for Parliament to determine whether the amendment should be made or should remain. And when the measure has passed both Houses, it cannot be altered in any way. To cure the most obvious blunder or oversight fresh Parliamentary legislation is required.

But though the Executive Government cannot determine whether any legislative measure should or should not be introduced, or should or should not be passed, it has, through its control over the business arrangements of the House, much to say as to the chances of any given measure becoming law. And though it cannot dictate the ultimate form which a Bill is to assume, it can, by suggestion and persuasion, do much to determine that form.

In the United States Congress the arrangement of business is said to rest largely with the Speaker. In the House of Commons it rests, subject to Standing Orders, with the political leader of the House, who represents the Executive Government. It is in consultation with him that the daily list of business is settled by the chief 'whip.' Under Standing Orders the only time appropriated for private members' Bills is Wednesday afternoon. Tuesdays are reserved for private members' motions. On other days Government

business takes precedence. When urgent Government business is in progress the Government usually appropriates Tuesdays, and it always appropriates Wednesdays also during the latter part of the session. After midnight no ordinary¹ Bill can be advanced a stage except by consent, and a single member's opposition, after that hour, suffices to block a Bill. Unless a private member's Bill is of a character so simple and uncontroversial as to meet with no objection from any quarter, his only chance of getting it read a second time depends on his securing, by ballot, an early place on some Wednesday. Unless that Wednesday falls early in the session, the probability of the Bill making further progress is small. If the measure meets with general support the Government may be induced to favour it by giving it a place on a Government day. But, in that case, it usually puts the promoter 'on terms' by requiring him to make such amendments in the form and substance of the Bill as will make it conform to the views of the Government. Thus, although private members' Bills largely outnumber Government Bills, the proportion of them which become law is, by comparison, extremely small²,

¹ A limited class of Government measures, mainly financial, are exempted from the twelve o'clock rule.

² The proportion in recent years is shown by the following figures. These figures refer to the House of Commons only, but include Bills brought from the Lords, whether or not proceeded with in the House of Commons. The number of Bills which, having been introduced in the House of Lords, do not reach the Commons, is not large enough to affect the general result.

| Session. | Total Bills introduced. | Government. | Private Members'. | Royal Assent. | |
|-------------------------------------|-------------------------|-------------|-------------------|---------------|-------------------|
| | | | | Government. | Private Members'. |
| 1895, first & second sessions | 263 | 66 | 197 | 38 | 12 |
| 1896 | 256 | 65 | 191 | 44 | 16 |
| 1897 | 263 | 67 | 196 | 54 | 16 |
| 1898 | 259 | 65 | 194 | 49 | 17 |
| 1899 | 224 | 53 | 171 | 37 | 16 |
| 1900 | 238* | 66 | 172 | 49* | 15 |

* Including the Post Office Sites Bill, which was introduced as a public Bill, but is classed and numbered among the local Acts.

Ch. X. and of that proportion most, if not all, are materially recast¹.

The change which gave the Executive Government increased control over, and increased responsibility for, Parliamentary legislation, dates approximately from the Reform Act of 1832. In the interesting remarks quoted on a previous page², Sir Charles Wood (the late Lord Halifax) contrasts the Parliament of 1828 with the Parliament of 1855. In 1828, the functions of the Government were chiefly executive, and alterations of the law were 'proposed by independent members, and carried, not as party questions, by their combined action on both sides.' It was not the business of the Executive Government to initiate legislation. The Speech from the Throne did not embody a Government programme of legislation for the session. In 1855 the responsibility for initiating legislation was thrown on the Government. The private member of Parliament knew, as he knows now, that no important legislative measure could be carried unless initiated or aided by the Government, and he had learnt that of the two alternatives, initiation or aid, the former was the preferable and the more likely to be effective.

Among the causes of this change, the most important is probably the increased complexity of legislation since 1832.

Under modern conditions the drafting of a Bill which aims at any administrative reform usually requires more expert knowledge than a private member of Parliament can command. What authorities, central or local, should be charged with the new duties? What staff is available for the purpose? How is the money to be found? What departments must be consulted and conciliated? What vested interests will be affected? What provisions of the numerous Acts of Parliament bearing on the subject are to be applied, superseded, or borne in mind? These, and numerous other questions of a like

¹ A comparison of either the Workmen's Compensation Act, 1900, or the London County Council Electors Qualification Act, 1900, with the Bill on which it was founded, will illustrate this statement.

² See p. 82.

nature, beset and often baffle the private member in his attempts at legislation. CH. X.

And, as legislation has become more complex, so Parliament and the public have become more critical. Bills are nowadays reproduced, summarized, and criticized by newspapers, are made the subject of comment by professional, industrial, and philanthropic associations, are studied by constituents, and therefore cannot be disregarded by members. Even when a private member's Bill secures the favour or escapes the vigilance of a Government department, he is fortunate indeed if the provisions are such as to commend themselves to the views of all his brother members and of those whom they represent. And a single local objection usually secures opposition in Parliament. In most Parliaments there is some member who undertakes the vexatious, but sometimes useful, functions of objector-general, and who opposes the passage of every Bill until its provisions have been explained and justified to his satisfaction.

If the increased vigilance of Parliament and the public has checked legislation by private members, it has also augmented the difficulties of Government legislation, and materially affected the form which that legislation has assumed. A generation or two ago a minister would satisfy himself, or accept the assurance of his department, that his Bill contained the necessary provisions, would explain his scheme in Parliament, and would leave form and details very much to the draftsman. The number of members who took an active part in the discussions in committee was not large: the amendments moved were not numerous. Under these circumstances the length of a Bill was of no great importance. It might contain details which, although not necessary, were usual, and might be useful. In the present day a minister demands before all things that his Bill should be short. Clear it ought to be: short it must be. The more words it contains the more pegs it offers for amendments. This demand for brevity has produced evils, but has made for good on the whole. On

CH. X. the one hand it has compelled resort to illegitimate devices, such as unwarrantable extensions of the method of legislation by reference, a method which all Oppositions denounce, and which all Governments adopt. On the other hand it has pruned away the prolixity and tautology which Parliamentary draftsmen had inherited or copied from conveyancers, and has emphasized the distinction between matters which must be regulated by Parliament itself, and matters which may be left to departmental or local regulations, or to the exercise of individual discretion. On the question where that line should be drawn there will be much difference of opinion, but that it can be drawn, and should be drawn, all will admit. Nor will it be denied that the minute details in which many earlier Acts abounded conduced neither to the intelligibility of the law nor to the facility of administration. Indeed, many of those provisions were only made workable by being ignored in practice.

One important result of the new responsibility of the Government for Parliamentary legislation, and of the increased complexity of that legislation, has been the creation of special machinery for the preparation of Government measures. As long ago as 1837, the Home Office, then the principal source of administrative legislation, felt the need of a special office for the drafting of Bills for the conduct of which it was to be responsible. The Home Office Counsel was soon utilized by other departments, and in 1869 the extension of his sphere of action was recognized and confirmed by his conversion into the Parliamentary Counsel, with duties and responsibilities no longer departmental but general.

The Parliamentary Counsel is not an officer of the legislative body. He is not appointed by nor responsible to either House of Parliament. Nor are his services available to any private member of Parliament, except under express instructions from the Executive Government. He is appointed by the First Lord of the Treasury, who usually represents the Executive Government in the House of Commons, and he is attached to

the Treasury in its character of central department of the administration. Although he acts for all the departments, he does so only on instructions received through the Treasury. His central and neutral position enables him to discover and direct attention to inconsistent or overlapping legislative proposals, and to suggest modes in which the conflicting views of different departments as to the form which legislation should assume may be reconciled or harmonized. Like his predecessor the Home Office Counsel, he is not merely a draftsman, but is expected to give advice, when requested, on any matter involving, or likely to involve, legislation. But of course his responsibility, like that of other permanent officials, does not extend to any action or inaction which may ensue on the advice given. For this, the minister concerned is alone responsible.

The Parliamentary Counsel's office is the result of the exceptional relation which exists between the Executive Government and the legislature in England, and accordingly it has no precise analogue in any other country, though the need for some such institution seems beginning to be felt in the self-governing colonies¹.

It will have been seen that two of the leading characteristics of English legislation are, first, that the legislature is concerned more with the making and mending of administrative regulations than with the formulation of 'lawyers' law'; and secondly, that in the exercise of its functions it is largely led, and virtually controlled, by the executive power. The third characteristic is closely connected with the first two. Seeing that the matters with which the English legislature is concerned are mainly matters of administration, it may be asked—a statesman of the Napoleonic type would certainly ask—Why should the legislature concern itself with all these matters at all? They belong to the sphere of the executive, not of the legislative, authority. If the legislature must interfere, why should it not content itself with laying down

Distrust of official discretion.

¹ See Ch. IX.

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a few broad, general principles, and leaving the details to be worked out, as they can and should be worked out, by the executive authorities, central or local?

The answer to this question has been indicated in Chapter III. Rightly or wrongly, Englishmen have an instinctive distrust of official discretion, an instinctive scepticism about bureaucratic wisdom, and they have carried this feeling with them into the United States and the British Colonies. They are ready enough, they are often embarrassingly eager, to confer new powers on the executive authority, central or local. But they like to determine for themselves how those powers are to be exercised. They like to see, in black and white, the rules by which their liberty of action is restrained, and to have an effective share in the making of those rules. And they insist on the meaning of those rules being determined, not by administrative authorities, nor by any special tribunal, but by the ordinary law courts of the country. This is the peculiarity which constitutes the most marked distinction between British and American legislation on the one hand, and Continental legislation on the other, and which makes the framework and arrangement of an English statute such an incomprehensible puzzle to the ordinary Continental student of laws.

It is quite true that English legislation has recently shown a tendency to assimilate to Continental methods, not indeed in the reference to exceptional tribunals of questions as to the meaning of legislative enactments, but in the avoidance of unnecessary details. The modern English statute is couched in more general terms, descends less into minute details, and leaves a wider range for subordinate legislation and a wider scope for official discretion in the execution and development of the law, than its predecessor of forty or fifty years ago. This tendency makes for perspicuity as well as brevity, and therefore for improvement in the form of the law. But it must not be exaggerated or abused. The instinctive English distrust of official discretion and jealousy of encroachments by

the executive on the sphere of the legislature, still exist, and unless the temper of Parliament should materially change, will continue to exist, and to be an important factor in the form of Parliamentary legislation. If any minister doubts their existence, let him yield to the temptation of asking for power to exercise departmental discretion, or to make departmental rules, in terms wider and more unrestricted than the circumstances of the case may require. He is pretty sure to receive from his own side hints, friendly but unmistakable, that powers of this kind can only be obtained by general consent, and that if opposition is threatened from any quarter, he will do well to draw in his horns and be more modest in his drafts on the confidence of the House. Opposition may often be averted by prudent limitation of the powers asked for, either by specifying more minutely the purposes for which they are to be exercised, or by submitting their exercise to the approval of Parliament. And care should be taken that the control thus reserved is real and not illusory. The practice under which schemes and rules requiring Parliamentary approval are brought on for discussion after midnight makes Parliament more reluctant than it would otherwise be to concede to the executive the power of making such schemes and rules. And finally, it must be remembered that Parliament, whilst casting on the executive the responsibility for the initiation and framing of its more important legislative measures, and delegating to the executive, under due limitations, the power of supplementing these measures by subordinate rules, yet jealously reserves to the ordinary courts of the country the exclusive right and power of interpreting all enactments, whether made directly by Parliament, or under powers delegated to an executive authority¹. Therefore, not only Acts of Parliament, but

¹ A department sometimes asks for and obtains power to decide questions arising out of its rules, but this power is rarely granted, and would not be construed as ousting the right of the law courts to determine what is and what is not the law.

Ch. X. rules made under statutory powers, ought to be expressed with such technical accuracy and precision as will enable them to face the ordeal of judicial interpretation.

Com-
parison
with
other
legisla-
tures.

In any comparison of the English Parliament with other legislatures, the leading characteristics of English Parliamentary legislation, to which reference has been made above, must be carefully kept in view. Unless this is done, the resemblances will be deceptive and the differences unintelligible.

United
States
legisla-
tion.

Of all such comparisons, the most instructive is perhaps that with the legislature of the United States, because it shows how a people starting with the same habits, traditions, and modes of thought as our own, may, by making a cardinal point of a different constitutional principle, the severance of executive and legislative authority, arrive at curiously different results. This comparison has been drawn with such amplitude of knowledge and such fullness of detail by Mr. Bryce in his *American Commonwealth*, that it is unnecessary to do more than refer to his chapters on 'Committees of Congress' and 'Congressional Legislation' in that work. For present purposes, it must suffice to remind the reader that the chief point of resemblance between English and American legislation is the desire to be governed by fixed written rules, and to leave as little scope as possible to official discretion, and the consequent minuteness of detail into which legislation descends; whilst the chief point of difference is the absence in the United States of control by the Executive over the preparation or initiation of legislative measures or their passage through the legislature, and the large powers which are delegated to committees on the Continental plan. In form and arrangement there is a strong family resemblance between English and American enactments, but in point of draftsmanship we have probably nothing to learn from the United States, where the preparation of legislative measures is usually the work of amateurs.

Conti-
nental

For a comparison of English legislative methods with the

methods of Continental legislatures there is no guide who writes with the same authority and fullness of knowledge as Mr. Bryce, but many useful and suggestive remarks may be found in Mr. Lowell's book on *Governments and Parties in Continental Europe*¹. The comparison is less instructive than that with the United States, because, although Continental legislatures have borrowed some rules and practices from the 'mother of Parliaments,' their procedure is usually based on and adapted to different constitutional habits and traditions. In particular, the Executive has, at all events in France and Italy, less control over the initiation and shaping of laws; the elaboration of laws is extensively delegated to bureaus or committees; and far greater latitude is allowed to the administrative authorities both in the execution and in the interpretation of laws². In comparing the form of English with that of Continental enactments it would not be fair to compare or contrast the administrative measures which occupy the greater part of the English Statute Book with any of the great Continental Codes. These Codes represent a kind of legislation which Parliament has not attempted except in one or two cases which prove the rule³, which it certainly is not qualified to perform, and which in Continental countries is substantially performed by a committee or commission of experts. But credit is due to legislatures which, having recognized the need of legislation of this kind, can appreciate good work when done, and can adopt it without more than a reasonable amount of criticism. To such credit many of the Continental legislatures, especially the legislature of the new German Empire, are entitled in a very high degree⁴.

A fairer comparison is with the administrative measures which form the staple of current legislation, both in England and on the Continent. The Frenchman's innate respect for his language, his appreciation of form, precision, and logical

¹ See the passages quoted in Ch. III above.

² See Ch. III and notes A and B to Ch. VI.

³ See above, p. 128.

⁴ As to Continental codification, see above, pp. 15, 17, 157.

CH. X. arrangement, display themselves in legislation as well as in other forms of composition, and a well-drawn French law is a model of its kind. To an English eye, the German sentence often seems clumsy, and the Italian flaccid, but on such points a foreigner is ill qualified to judge. As has been observed above, Continental laws usually leave to executive regulations and official discretion a much greater latitude than would be consonant with English constitutional principles. But it is interesting to note that in this respect recent laws show a tendency to assimilation. English laws have become more general and concise: foreign laws have begun to enter into greater detail. At the same time, according to some competent critics, French legislation has recently lost some of the lucidity and precision by which it was once characterized.

‘Les lois françaises se distinguent par la clarté et par la concision de leurs textes. Ces qualités tiennent en partie à la netteté et à la précision de la langue. En outre, le législateur s’attache généralement à mettre en lumière et à poser dans la loi les principes; il ne s’embarrasse pas autant que les Parlements anglais et américains, par exemple, dans les multiples exemples d’applications. Mais il semble que les Assemblées montrent aujourd’hui une tendance fâcheuse à s’immiscer dans une foule de détails qu’il vaudrait mieux laisser à la prévoyance du pouvoir exécutif¹.’

Colonial
legisla-
tion.

The legislative methods of the English self-governing Colonies are closely modelled on English precedents, and, both in their processes and in their results, present the same general features as their English prototypes. Many Colonies have adopted wholesale English Acts of Parliament with the necessary adaptations to local circumstances. But they have shown much more enterprise and courage than the mother-country in recognizing and meeting the need for improvement of the form of their statute law, and have carried much further the useful work of consolidating and codifying their law². And some of their constructive legislation shows great

¹ L. Dupriez, *Les ministres dans les principaux pays d’Europe et d’Amérique*, ii. 377.

² See Ch. IX above.

ingenuity and originality. The Australian Commonwealth Act, which, though passed into law by the English Parliament, was drafted by an Australian Convention, and bears the Australian mint-mark in every sentence and line, is a piece of work of which any legislature might justly be proud. CH. X.
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On wholly different lines from those of Colonial legislation are framed the constitution and practice of the British-Indian legislatures. These legislatures are not popular but bureaucratic, and the Governor-General's Legislative Council is perhaps as good a specimen of a bureaucratic legislature as can be found. The work, like that of American and Continental legislatures, is done in committee. The debates in the Legislative Council are apt to be formal, unreal, and soporific. The rule which requires members to keep their seats while speaking, and which used to be known as 'the rule for the suppression of Sir Barnes Peacock,' is destructive not only of rhetoric but of animation, and is productive of long written discourses. The committees resemble the departmental committees of permanent officials to which drafts of Government Bills are often referred in England, and their discussions are useful and practical. The members are usually masters of the subjects with which they deal, and it is not their fault if the point of view taken is apt to be too exclusively official. The case of the intelligent, capable, and public-minded administrator is effectively presented, but one would like to hear more of what could be said by those on whom the law is to operate. The classes whose rights and interests are affected are very numerous, very diverse, very far off, and very inarticulate, and one has to rely much on paper evidence. But the work is excellent of its kind. Anglo-Indian legislation.

Anglo-Indian Acts are sometimes held up as a model for English legislation. The Anglo-Indian Codes, especially the Penal Code, have great and undeniable merits. Most of them were framed to meet a pressing need, and they have sufficed, on the whole, for the purposes for which they are required. But some of them, the Procedure Codes in

CH. X.

particular, show a good deal of rough workmanship, and if they were tried by the English standard it is doubtful how far they would stand the test. The Law Member of the Governor-General's Council, who is responsible for the form of laws passed by that Council, enjoys many advantages in comparison with an English minister in charge of a bill. His laws are easier to draw, and easier to pass through the legislature. They are easier to draw, because the Indian administrative system is simpler than the English, and because the political and social conditions of the country allow and require a much greater elasticity of administration and therefore a greater generality of statement in the law. They are easier to pass, because they come before a small body, and are referred to a still smaller select committee, of which the Law Member is ex-officio chairman, and over the proceedings in which he exercises a preponderating control, so that, as far as form and arrangement is concerned, he is master of the situation from the first stage of a Bill to the last.

To a member of Parliament the structure of an average Indian Act would appear too loose on the one hand and too technical on the other. He is accustomed to more precise directions as to the mode in which, and the conditions under which, a power is to be exercised; he is more jealous and suspicious of executive discretion. An Indian amending Act is usually framed on the plan of inserting or substituting particular words or sentences in the amended Act. This method is very convenient to those who have to note up amendments in their Statute Book, but makes a Bill unintelligible to those who have not before them either the text of the previous Acts, or a full commentary, such as is usually supplied by the 'Statement of Objects and Reasons,' and is extremely embarrassing for purposes of discussion and amendment, especially in a numerous assembly. It could therefore only be adopted in England with reference to measures which are practically uncontroversial. The searching criticism to which an English measure is usually subjected in its

passage through Parliament, though often embarrassing, is also often useful and suggestive, and is much more thorough than any which accompanies an Indian Bill. The Indian legislator has much more difficulty in discovering how his proposed law will operate, or whether it will operate at all. The difference, in fact, is between legislation by experts, with the minute but incomplete knowledge that experts possess, and legislation by a popular assembly.

Sir James Stephen has given an interesting description of the mode in which the Indian Code of Criminal Procedure Bill of 1872 was discussed and settled by the Select Committee to which it was referred. After passing a well-deserved eulogium on 'the wonderfully minute and exact acquaintance with every detail of the system displayed by the civilian members of the Committee,' he concludes by saying, 'I do not believe that one Act of Parliament in fifty is considered with anything approaching to the care, or discussed with anything approaching to the mastery of the subject with which Indian Acts are considered and discussed¹.' If Sir James Stephen had been more familiar with the preliminary stages of English Acts of Parliament, it is probable that he would have qualified this statement. The amount of thought, time, and labour which is bestowed on the preparation of the more important Government measures in England before they emerge to the public view is not fully realized. Measures such as those which have recently transformed the system of local government in the several parts of the United Kingdom are the result of months', or even years', preliminary elaboration in the closet. For instance, the archives of the Parliamentary Counsel's office show that the Local Government Act, 1888, was the outcome of labour which had extended over at least ten years². When it has been

¹ *History of the Criminal Law of England*, iii. 346.

² As far back as October, 1852, Disraeli submitted to the Cabinet a suggestion for making county rates managed by a more popular Board (Malmesbury, *Memoirs of an Ex-Minister*). Before 1888, Bills for this

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determined to give a measure a leading place in the Government programme of legislation for the session, and to press it seriously forward, its preparation imposes a heavy tax on the time of the draftsman and of the other officials concerned. The measure will often be referred to a Committee of the Cabinet, who will assist the minister in charge in considering questions of principle. The first crude sketch will be gradually elaborated. There will be daily conferences with the minister or with the permanent head of his department, or with both. There will be interviews and correspondence with experts in various branches of the subject with which the measure deals. Notes will have to be written tracing the history of previous legislation or attempts at legislation, and explaining the reasons for and effect of the several proposals embodied in the draft Bill, and stating the arguments which may be advanced for and against them, and these will soon grow into a formidable literature of commentaries. Each conference may involve a recasting and reprinting of the draft Bill, and successive editions will appear with bewildering rapidity. It was currently reported at the time that the edition of the Irish Land Bill of 1881, which was laid on the table of the House of Commons, was the twenty-second. I have not verified this statement, but there is no intrinsic improbability in it. The alterations may be such as to revolutionize completely the character of a measure. Cabinet secrets are, as a rule, well kept, and the transformations which occur in the embryonic development of a Government measure are known only to a chosen few. But in some cases ministerial indiscretion has lifted the veil. Lord Malmesbury has given us an amusing description of the circumstances under which the Reform Bill of February, 1867, commonly known as the Ten Minutes Bill, was hatched in the afternoon of the day on which the provisions of an earlier and wholly different Bill

purpose were from time to time laid before Parliament, but usually under circumstances which showed that there was no serious intention of proceeding with them.

were to have been explained by Mr. Disraeli in the House of Commons¹. The labour involved in the preparation and revision of a leading Government measure, both at the earlier 'underground' stage before it has been introduced, and during the subsequent discussions in Committee, is of the severest kind, has to be performed under great pressure of time, and at the same time has to be very thorough and minute. I have been responsible for the preparation and introduction of many leading Anglo-Indian Acts, including the Bengal Tenancy Act of 1885, which was perhaps as complicated a measure as ever engaged the attention of the Indian legislature; and I can say with confidence that the time and labour which their preparation and revision involved, and the thoroughness with which they were discussed, bear no comparison to the time, labour, and conscientious care bestowed on the preparation, discussion, and revision of such English measures as those which have recently recast the system of local government in the United Kingdom.

In judging English Acts of Parliament it must be remembered that the defects with which they are chargeable are in great measure directly due to the principles of the constitution under which they are framed. In the first place, an ordinary Act of Parliament is essentially a creature of compromise. In point of form, it is a compromise between the terms of art demanded by the lawyer and the popular language required by the layman. If the former finds such a term as 'land' loose and slipshod, to the latter 'hereditament' is pedantic and unintelligible. The result is that the layman usually finds his satisfaction in the text, and the lawyer has to be consoled with a definition. In point of arrangement, an Act is a compromise between the order most convenient for debating a Bill and the order most convenient for administering an Act. In point of substance, a Bill as it enters Parliament may be, and as it emerges frequently is, a compromise between divergent views. It is the work of many minds, and the

Causes of defective form of Acts of Parliament.

¹ *Memoirs of an Ex-Minister.*

CH. X. product of many hands. Now compromise and co-operation are admirable things in politics, but they do not always tend to clearness or accuracy of style, logical arrangement, or consistency, in literary composition.

The progress of a Bill through the House.

Those who are familiar with Parliamentary procedure are well aware of the difficulties with which the promoter of any important measure has necessarily to contend. The measure may have gone through a long period of gestation before its introduction to Parliament. Information and opinions on different points will have been confidentially obtained from various quarters; the provisions of the measure will have assumed many varying forms; and the alternatives will have been carefully discussed and compared. Yet, in spite of these precautions, as soon as the measure has been printed and circulated, swarms of amendments will begin to settle down on the notice paper, like clouds of mosquitoes. The minister in charge of the Bill has to scrutinize all these, with the help of his permanent staff and of the draftsman, to formulate reasons for their acceptance or rejection, and to prepare replies to, or amendments for meeting, the numerous points raised since the introduction of the Bill. Letters and articles appear in the newspapers. Questions are asked in the House. Correspondence pours in from all parts of the country. The peculiar circumstances of the parish of Ockley-cum-Withypool must surely have been overlooked by the framers of the Bill. There is a local Act which will require consideration. Above all there are the vested interests. Journalists may write eloquent leaders, members of Parliament may make sonorous speeches, about the effect which the measure will have in promoting the welfare or undermining the institutions of the country. But to the parish beadle of Little Peddlington the question of supreme importance is how it will affect his emoluments, existing and prospective. It is with reference to them that he studies the Parliamentary Debates, indites missives to his representative, and organizes deputations to departments. Every member of Parliament knows this beadle, under various

names. Questions of this kind occupy all the working time during the interval between the second reading and Committee, and during the progress of the Committee stage. Inside the House the minister is battling with amendments, some from enemies, anxious to make the Bill unworkable or to reduce its operations to a minimum, others from indiscreet friends. Amendments are often framed hastily without reference to grammar, logic, consistency, or intelligibility. They are apt to be crowded in at the beginning of each clause or sentence, with the view of obtaining precedence in discussion. The language of a law ought to be precise, accurate, and consistent, but the atmosphere of a crowded or heated assembly is not conducive to nicety or accuracy of expression. Decisions often have to be taken on the spur of the moment, and in view of the possibility of a snap division. At last the amendments are cleared off the paper; the new clauses, often raising the same questions, are disposed of; and the much buffeted craft, with tattered sails, the deck encumbered with wreckage, and with several ugly leaks in her hold, labours heavily into a temporary harbour of refuge. There is a short interval for the necessary repairs, and then the struggle begins again at the report stage. There may or may not be a sufficient opportunity for making such formal amendments as are necessary to make the measure decently consistent and intelligible. If not they must be left for the House of Lords.

It will hardly be said that this is an unfair description of the common experience of those who have to pilot important measures through Parliament. And if so, the marvel perhaps is not that the drafting of such measures is open to criticism, but that it is not much more defective than it is. An obvious criticism on the existing procedure for legislation, one which is easily made and often heard, is that the fault is due to the clumsy and ignorant interference of Parliament. 'Leave the drafting of laws to experts, and the grumbles of the legal profession and of the public would cease.' In support of this view the high authority of John Stuart Mill might be cited.

Cir. X.

Should
legisla-
tion be
delegated
to ex-
perts?

CH. X.
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'Any Government fit for a high state of civilization would have as one of its fundamental elements a small body, not exceeding in number the members of a Cabinet, who should act as a Commission of Legislation, having for its appointed office to make the laws. If the laws of this country were, as surely they will soon be, revised and put into a connected form, the Commission of Codification by which this is effected should remain as a permanent institution, to watch over the work, protect it from deterioration, and make further improvements as often as required. No one would wish that this body should have of itself any power of *enacting* laws; the Commission would only embody the element of intelligence in their construction; Parliament would represent that of will. No measure would become a law until expressly sanctioned by Parliament, and Parliament, or either House, would have the power not only of rejecting but of sending back a Bill to the Commission for reconsideration or improvement. Either House might also exercise its initiative by referring any subject to the Commission with directions to prepare a law. The Commission, of course, would have no power of refusing its instrumentality to any legislation which the country desired. Instructions, concurred in by both Houses, to draw up a Bill which should effect a particular purpose, would be imperative on the Commissioners, unless they preferred to resign their office. Once framed, however, Parliament should have no power to alter the measure, but solely to pass or reject it; or, if partially disapproved of, remit it to the Commission for reconsideration. The Commissioners should be appointed by the Crown, but should hold their offices for a time certain, say five years, unless removed on an address from the two Houses of Parliament, grounded either on personal misconduct (as in the case of judges), or on refusal to draw up a Bill in obedience to the demands of Parliament¹.'

The substantial suggestion, it will be seen, was that Parliament should abdicate its function of amending Bills, and should confine itself to the simple question whether a particular Bill presented to it ought or ought not to pass, the question now decided at the second reading stage. For this method of legislation there is a historical precedent. It was the method adopted under the Roman republic. The magistrate submitted his proposal of law to the comitia, and that body voted 'aye' or 'no' on the question whether it should or should not become law. But this plebiscitary method of

¹ *Representative Government*, ch. v, 'Of the proper functions of representative bodies.'

legislation presupposes laws of extreme simplicity and brevity, and a suggestion that a modern popular assembly should abstain from all criticism of the details of a measure submitted to it for approval hardly falls within the range of practical politics.

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Popular legislation has its defects, but it has its advantages also, and in the English view the advantages preponderate. It is true that the provisions of a Bill as introduced into Parliament ought to be, and often are, perspicuous, consistent, orderly, and luminous, and that their perspicuity is often marred, the principle of their arrangement upset, their consistency disturbed, by amendments in Committee. On the other hand, the substantial improvements which are effected often do more than atone for any deterioration in form. The searching ordeal to which Bills are exposed in their passage through Parliament frequently brings out defects and omissions against which the most skilful draftsman could not be expected to provide, which the most omniscient official could not be expected to foresee.

Advantages of existing system.

And the opportunities which the existing procedure and practice afford for the avoidance of ill-considered, ill-drawn, or inconsistent amendments, and for the removal of formal defects, are greater than are realized by those who are not familiar with Parliamentary habits.

At first sight nothing would seem more preposterous than to submit a complicated draft for criticism and correction to a miscellaneous assembly of 670 persons. But if the member in charge of a Bill is a minister with a compact and strong following at his back, and if he has the qualities which command the confidence and respect of the House, he can retain control over both the form and the substance of his Bill through all the vicissitudes of a long discussion in Committee. It is true that the qualities required for the successful steering of a complicated and controversial Bill through Committee, are qualities of a very high order. They include tact, readiness, resourcefulness, firmness, and, above

all, patience and good temper. The slightest appearance of dictation, the slightest loss of temper, will often set the House aflame. But if the minister can be conciliatory without 'wobbling,' can distinguish between amendments which are fatal to his scheme and those which are not, can by a happy and timely suggestion indicate the way out of a confusing discussion, and can suppress his own impatience until it is shared by the Committee, he can, without going to a division, often persuade his critics either to withdraw, or to modify, or to postpone their amendments, or, at the worst, make his assent to their acceptance subject to further consideration at a later stage of the Bill. Qualities of this kind are not rare among English statesmen, and are developed by Parliamentary training. Those who have been in the habit of attending legislative discussions, whether in Committee of the whole House or in any of the Grand Committees, cannot fail to have been struck by their display, and to have been also impressed by the good sense, good temper, and readiness to adopt compromises and accept reasonable assurances which characterize a Committee, except when it has got 'out of hand.'

The 'report' stage of a Bill supplies an opportunity for setting right things which have gone wrong in Committee. Sometimes, however, a heated discussion has been compromised by a provision or phrase, which may be obscurely or inartistically expressed, but difficult or practically impossible to amend. Instances have been known in which a difficulty has, for tactical reasons, been deliberately shirked, or in which an obscurity or ambiguity has been allowed to remain for fear of exciting a prolonged debate. Occasionally the only alternative is between passing a measure in an unsatisfactory form and sacrificing it for the session, with the prospect of delaying indefinitely a useful reform. These are among the most frequent causes of the blemishes which call down judicial animadversions¹.

¹ The doubt about the eligibility of women to seats on county councils is a case in point.

Amendments which cannot be made at the report stage can often be made in the House of Lords, which thus discharges to some extent the functions of a revising authority.

Heroic suggestions for improvement of legislative procedure will not be looked for here. Much has been done towards facilitating the discussion, and simplifying and shortening the form of Bills, by separating principles from details, and leaving the latter to be regulated by statutory rules or orders. The success of experiments in this direction depends upon two things: upon their not being carried too far, and upon the provision of adequate opportunity for criticizing the exercise of delegated legislative authority. 'Article I. Stray dogs are prohibited. Article II. The Minister of the Interior is charged with the execution of this decree.' A harassed President of the Board of Agriculture might sometimes regard with envy the simplicity of this form of legislation, though he might have forebodings of difficulties in filling up and negotiating his blank cheque should he obtain it. But he would know that it would be useless to ask for it. And where the legislature delegates to Government departments in more limited terms powers of making rules which affect outside interests, provisions for preliminary criticism of the drafts, such as are embodied in the Rules Publication Act of 1893, though sometimes productive of delay and inconvenience, are a salutary check on hasty and improvident legislation.

Complaint is often made that a modern Bill is too technical to be intelligible. For one cause of unintelligibility, the complexity of modern administration is to a great extent responsible. It is easier to understand or mend a spindle than the machinery of a cotton mill. But there is another obstacle in the way of drawing Acts in a simple form, which is removable, and which it rests with the legislature to remove. An amending Bill which has to refer to some half-dozen previous enactments on the same subject can hardly be simple in form or easy to understand. But if the task

Systematic consolidation would remove many defects.

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— of consolidating Acts is neglected or deferred, this is the form which many amending Bills must inevitably assume. And Parliament is not likely to make effective progress with consolidation unless it devises some standing machinery for the purpose, delegates the task to a Committee or some similar body, and accepts reasonable assurances from competent and responsible authorities that the work of that body is properly done.

CHAPTER XI

FORM AND ARRANGEMENT OF STATUTES

MUCH legal literature has been devoted to the interpretation of statute law¹. The object of the writers of books on this subject has been to collect such judicial decisions and other authorities, and to formulate such rules and principles, as may assist the courts and legal practitioners in determining the meanings which ought to be attached to obscure or ill-expressed enactments. Books of this kind are useful to the draftsman of an Act of Parliament as showing the meaning which the courts may be expected to attach to particular expressions, and the canons of construction which the courts will observe, and also as illustrating the pitfalls which the draftsman should avoid, and the consequences which the use of loose or inaccurate language may entail. But they are concerned rather with the pathology or nosology of statutory drafting than with its laws of health. They illustrate bad drafting; they do not, except indirectly, lay down rules for good drafting. On the latter branch of the subject comparatively little has been written².

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General principles of statutory drafting.

It may be said that the rules of good drafting are simply

¹ See e. g. Dwarrris on *Statutes*. Sedgwick, *Statutory and Constitutional Law*. Maxwell, *Interpretation of Statutes*. Hardcastle on the *Construction of Statute Law* (second edition by Craies, 1892). Wilberforce on *Statute Law*. Stroud, *Judicial Dictionary*.

² Bentham's *Nomography* (*Works*, by Bowring, vol. iii. 231) is full of acute and suggestive criticisms on 'the general depravity of the style of English Statutes,' but the 'Equity Dispatch Court Bill' (ib. 319), in which he attempted to reduce his theories to practice, is a very extraordinary production. A more practical attempt to apply Bentham's

CH. XI. the rules of literary composition, as applied to cases where precision of language is required, and that accordingly any one who is competent to draw in apt and precise terms a conveyance, a commercial contract, or a pleading, is competent to draw an Act of Parliament. But this is obviously a superficial view. Just as an excellent conveyancer may be a very poor pleader, and *vice versâ*, so an accomplished and experienced conveyancer or pleader may find himself quite at sea if called upon to draw a parliamentary statute. Both the subject-matter and the mode of treating the subject-matter are different. The ordinary training and practice of the Inns of Court require to be largely supplemented for the purpose of parliamentary drafting. What is essential to a sound lawyer, as distinguished from a skilful advocate, is a knowledge of the principles of that branch of the law which he practises. But the branches of law with which a practising barrister is ordinarily required to be conversant are those which relate to civil disputes, or to commercial transactions, or to the disposition of property, or to crime. He need not be familiar, as a rule he is not familiar, with administrative law. It is true that the growing complexity of the English administrative system, and the number and importance of the legal or semi-legal questions which arise in the course of central and local administration by public authorities, are gradually breeding up a class of lawyers who devote themselves specially to this branch of learning, or to some one or more of its ramifications, and that among these are to be found first-rate authorities on such topics as municipal, sanitary, railway, or highway law. But even these are usually specialists, and do not find it necessary to take any general or comprehensive view of the English administrative

principles was made by Mr. Arthur Symonds in the 'Papers relative to the Drawing of Acts of Parliament, and to the means of ensuring uniformity thereof, in language, in form, in arrangement, and in matter,' which were laid before the House of Commons in 1838. Lord Thring's *Practical Legislation* (now out of print) was based on his unrivalled experience as a draftsman.

system as a whole, or of the relation of its different parts to each other. CH. XI.

Now the branch of law with which Acts of Parliament are concerned is pre-eminently that which relates to the administrative duties and powers of public authorities. If the contents of the public Statute Book are analysed, it will be found that the proportion of its enactments which alter rules or principles of the common law is very small, and that the object of by far the greater part of them is to make some alteration in the administrative machinery of the country. Some improvement of administrative machinery is suggested, and among the questions which the framer of the proposed measure will have to consider are—What powers and duties already exist for the purpose contemplated? By whom are they exercised or performed? What is the appropriate local authority? What is the appropriate central authority? What should be the relations between them? What kind and degree of interference with public or private rights, either by the local or by the central authority, will be tolerated by public opinion? How is the money to be found? How is the change to be introduced so as to cause the least interference with existing rights and interests, the least friction with existing machinery? These are questions which a practising lawyer does not often have to consider, but which arise in the preparation of almost every public legislative measure. It is true that many of them are questions rather for the legislator than for the draftsman. But they are questions on which the draftsman will often be expected to advise, and on which the knowledge he has acquired will often enable him to give useful advice.

Nor are the rules and traditions of conveyancing applicable, without serious modifications, to parliamentary drafting. The framer of even the most complicated settlement has to provide for a limited number of cases or contingencies, which he can enumerate exhaustively, and for which it is sometimes desirable that he should make specific rather than general provision.

CH. XI. But the framer of an Act of Parliament has to lay down rules which are to be in force for an indefinite time, and to be applicable to conditions and circumstances of which the existing range and variety are of formidable complexity, and the modifications of which in the future are impossible to predict. Practice in the preparation of such instruments as the articles of association of a company is of greater value than practice in ordinary conveyancing, but even here the range and variety of circumstances which have to be contemplated is obviously much narrower than in the case of a general law. If a parliamentary draftsman is to do his work well, he must be something more than a mere draftsman. He must have constructive imagination, the power to visualize things in the concrete, and to foresee whether and how a paper scheme will work out in practice.

Again, the draftsman of an Act of Parliament has to prepare a document which has to be considered and possibly modified by a large number of persons, over which he can only exercise a very imperfect control after it leaves his hands, and the provisions of which may have to be settled on the spur of the moment and in the heat of debate. If its several parts are too tightly dovetailed together, if it is so constructed that a modification of one part necessarily involves numerous modifications of other parts, an amendment made in the course of debate may throw it hopelessly out of gear. For these reasons, the parliamentary draftsman is obliged, by the conditions of his craft, to employ a generality of expression, and to give his framework an elasticity of construction, which would shock the conveyancer.

Then, between the point of view of the lawyer and the point of view of the legislator there is a material difference. The lawyer proceeds on the basis of the existing law. He endeavours to ascertain what that law is, and to apply it to the facts. The legislator proceeds on the view that the existing law is defective or insufficient, and considers how the law should be changed in order to meet the requirements

of the case. It is often difficult for the trained lawyer to change his accustomed point of view, and consider, not merely what the law is, but what it ought to be. CH. XI.

Lastly, the draftsman of a public Act of Parliament has to be guided by rules, not only of logic, but of rhetoric. A Bill for such an Act may be regarded from two points of view. From one point of view it is a future law. From another point of view it is a proposal submitted for the favourable consideration of a popular assembly. And the two points of view are not always consistent. The mode of expression and arrangement which is most suitable to officials who have to administer the law, or to lawyers who have to explain the law, is not always that which is most suitable to the minister or other member of Parliament who has to pass the law. Lord Thring's aphorism, 'that Bills are made to pass, as razors are made to sell,' expresses an important half-truth. The minister in charge of a Bill will often insist, and wisely insist, on departure from logical arrangement with reference to exigencies of discussion. He will have considered how he intends to present his proposals to Parliament, and to defend them before the public, and will wish to have his Bill so arranged and expressed as to make it a suitable text for his speech. If the measure is at all complicated, he will desire to have its leading principles embodied in the opening clause or clauses, so that when the first fence is cleared the remainder of the course may be comparatively easy. In settling the order of the following clauses, he will consider what kind of opposition, and from what quarter, they are likely to evoke. He will deprecate unnecessary length, and will often wish to have his measure so drawn that it can be contained in a single clause or appear on a single page. He will prefer a few long clauses to many short ones, bearing in mind that each clause has, as a rule, to be separately put in Committee. His theoretical objections to legislation by reference will often yield to considerations of brevity. He will eschew technical terms, except where they are clearly

CH. XI. necessary, remembering that his proposals will have to be expounded to, and understood by, an assembly of laymen. He will bear in mind that members of Parliament, like other Englishmen, have a great respect for precedents, and will prefer a form of expression borrowed from, or having an analogy in, another Act of Parliament. And he will have learnt that there are certain provisions and expressions at which Parliament instinctively shies, others which it readily accepts. The draftsman has, of course, to bear in mind all these considerations. Indeed it may be said, without disrespect, that he has to study the idiosyncrasies of Parliament much as a *nisi prius* barrister has to study the idiosyncrasies of a common jury.

The notes and hints embodied in this chapter were put together with special reference to public Bills. For private Bills the forms periodically prepared by the Chairman of Committees (Model Bills and Clauses) are indispensable, and Clifford's *Private Bill Legislation* should be consulted. For the procedure, both on public and on private Bills, reference should be made to May's *Parliamentary Practice*, and to the *Standing Orders of the two Houses of Parliament*.

Pre-
liminary
work.

Before beginning to prepare a Bill it is essential to master the subject-matter. Where a doubtful question of construction arises, the courts are entitled to consider the previous law and practice, the mischief or defects which the law was intended to remove, and the nature of the remedy proposed. So, before devising a remedy, it is needful to know the existing law and practice, and to have a clear conception of the mischief or defects for which the remedy is required.

The law is to be found in Acts of Parliament, in judicial decisions, and in legal textbooks. The practice, that is to say the way in which the law actually works, is less easily learnt. Information may often be obtained from blue books, from debates in Parliament, and from similar sources, but is not always available in a written form. It must often be

derived from personal experience, or supplied by persons CH. XI. having such experience.

The defects which the proposed legislation is intended to remedy are usually to be gathered from parliamentary and other discussions and from reports of Royal Commissions or Parliamentary Committees.

It should be considered with respect to each proposed enactment whether parliamentary legislation is really required, and whether the object might not be attained by administrative regulations or by subordinate legislation, such as Orders in Council or statutory rules, and sometimes, whether, if legislation is required, it should not be embodied in a local Act. It may also have to be considered whether a Bill is of such a nature that the Standing Orders applicable to private Bills will apply to it¹.

For the purpose of studying the Acts, the most convenient plan is to obtain and fasten together King's Printer's copies of the several Acts, and then to strike out those portions which have been repealed by subsequent legislation, adding marginal notes to show how they have been repealed.

Lists of relevant judicial decisions, arranged in chronological order, and showing the point decided in each case, will often be useful.

So also will be a short bibliography of the blue books, text-books, &c., bearing on the subject of the measure.

It will save much trouble if the results of the information collected are embodied in a memorandum. Several documents of this kind may be required. It may be necessary to trace historically the course of previous legislation, and of discussions in Parliament and elsewhere, and to show how the existing statute law has been interpreted by judicial decisions

¹ The Standing Orders were held to apply to the Bill which became law as the Metropolis Water Act, 1899 (62 & 63 Vict. c. 7), but the Standing Orders Committee waived compliance with the Orders as to preliminary notices. Standing Orders were also held to apply to the Military Manœuvres Bill, 1900, and in this case the Committee declined to waive compliance.

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and has been construed in practice. A memorandum stating the leading features of the proposed legislation, and raising clearly the questions of principle to be decided, will usually be required. This will be useful for discussions preceding the introduction of the Bill and also as a brief for the speech required on introduction or second reading. In the case of a Government measure, a shorter memorandum, dealing only with the main points, may be required for the use of the Cabinet, and a still shorter memorandum may in some cases be prefixed with advantage to the Bill as introduced. The officers of Parliament, especially of the House of Commons, impose limits on the length of a memorandum of this kind, and object to the introduction into it of argumentative matter. Information of a more detailed kind should be embodied in the notes on the several clauses, and in preparing these notes care should be taken to quote fully, and to give precise references to, the enactments bearing on the subject-matter of each clause, and to supply such other particulars as may be required for discussion in committee or in the preliminary conferences. The information should be given in such a form as to be available for immediate use, and without reference to books or other documents. A statement in a tabular form or otherwise of the authorities who will be charged with the execution of the law, and of their powers and duties, will often be of great value.

When the measure is complex there should be, in the first instance, a 'scheme' or 'heads of a Bill' such as can be subsequently elaborated into clauses.

Arrange-
ment.

The arrangement of a Bill has to be considered both from the parliamentary and from the administrative point of view.

If the Bill is a fighting Bill the arrangement is of great political importance. The Bill should be so framed that the main issues which its proposals raise are disentangled from subordinate issues, are placed in the forefront of the measure, and are arranged in such manner as to facilitate discussion in Committee. Where the decision of an issue raised by one

clause depends on the decision of an issue raised by another clause, the latter clause must come first. Care should also be taken that one clause does not raise incidentally an issue which can be more conveniently discussed in connexion with a later clause. Subordinate matters should be dealt with in later parts of the Bill. Matters of detail should be relegated to schedules or left to be provided for by rules.

So far as parliamentary exigencies will admit, the subject-matter of a Bill should be arranged with reference to administrative convenience; in other words, its arrangement should be orderly and logical.

Normal and general provisions should be placed first. Special, exceptional, and local provisions should be placed towards the end.

Thus, a Bill applying to the whole of the United Kingdom should be framed with reference to English circumstances, and the necessary adaptations to Scotland and Ireland should be made by special clauses or groups of clauses towards the end of the Bill. In the same way special clauses should provide for places like London, which require special treatment, and for special classes of persons, such as infants, married women, lunatics, and limited owners.

Temporary and transitional provisions should be placed at the end of the Bill, because when they are spent they can be repealed without making gaps in the main body of the Act.

As a general rule, it is convenient to lay down first the rules of law to be observed, and then to state the authorities by which they are to be administered and the procedure to be followed in administering them.

The framework of a Bill may be made more intelligible by dividing it into parts and by grouping clauses under italic headings¹. But excessive subdivision should be avoided.

¹ As to the effect of thus grouping clauses, see *Hammersmith, &c., Railway Co. v. Brand* (1869), L. R. 4 H. L. at pp. 216, 217; *R. v. Local Government Board* (1882), L. R. 10 Q. B. D. at p. 321; *Union Steamship Company of New Zealand v. Melbourne Harbour Trust Commissioners* (1884), L. R. 9 App. Cas. at p. 369.

CH. XI. As a rule a Bill should not be divided into parts unless the subjects of the parts are so different that they might appropriately be embodied in separate Acts. The division of an Act into parts may affect its construction by indicating the scheme of arrangement¹.

In the case of a long and complicated Act it is useful to repeat the headings of parts and of groups of clauses at the head of each page. See the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and the Local Government Act, 1888 (51 & 52 Vict. c. 41).

The printer will, if so directed, prefix to the Bill an 'arrangement of clauses' made up from the marginal notes. This table should be studied for the purpose of testing the convenience and logical sequence of the arrangement adopted.

Marginal notes.

Attention should be paid to the framing of marginal notes. A marginal note should be short and distinctive. It should be general and usually in a substantival form, and should describe, but not attempt to summarize, the contents of the clause to which it relates. For instance, a marginal note should run: 'Power of [local authority] to, &c.,' and not 'Local authority may, &c.'

Clauses.

The marginal note often supplies a useful test of the question whether a subject should be dealt with in one or more clauses. If the marginal note cannot be made short without being vague, or distinctive without being long, the presumption is that more clauses than one are required.

A long and complex clause should be cut up into subsections.

When a Bill has passed into law it becomes an Act, and its clauses become sections. They should be referred to as sections in the Bill.

Reference to another clause of the same Bill by its number should, if possible, be avoided. The numbering of the clauses is always liable to be altered at the last moment by the addition, omission, or shifting of clauses, and there is

¹ See *Inglis v. Robertson* (1898), A. C. 616.

often no time to make the consequential alterations of refer- CH. XI.
ences.

Each sentence should be as short and simple as possible. Sentences.

The rules to be laid down will be either general or special, and either absolute or qualified.

Where a rule is to apply only to a particular case or set of circumstances, it is usually most convenient to state the case or set of circumstances first and let the rule follow. But where the rule is to apply to several cases or sets of circumstances, it is often convenient to state the rule first and enumerate the cases afterwards.

Where the rule is to be subject to qualifications, exceptions, or restrictions, these should follow the statement of the rule. But it is often convenient to prefix to the rule words indicating that it is to be so qualified.

Enumeration of particulars should be avoided. It is almost impossible to make the enumeration exhaustive, and accidental omission may be construed as implying deliberate exclusion, in accordance with the maxim *expressio unius est exclusio alterius*.

Each rule should be stated in general terms, but so far as practicable its application to particular cases should be tested for the purpose of seeing how it will work in each case.

The language of a Bill should be precise, but not too Language.
technical. An Act of Parliament has to be interpreted, in cases of difficulty, by legal experts, but it must be passed by laymen, be administered by laymen, and operate on laymen. Therefore it should be expressed in language intelligible by the lay folk.

In some cases the compromise between popular and technical language may be effected by means of a definition. But definitions are dangerous and should be sparingly used.

More words should not be used than are necessary to make the meaning clear. Every superfluous word may raise a debate in Parliament, and a discussion in court.

Different words should not be used to express the same thing.

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The same words should not be used with different meanings.

The future conditional ('if he shall') should be avoided. The future 'shall' is apt to be confused with the imperative.

The words 'herein,' 'herein-before,' and 'herein-after,' are ambiguous. They may mean in this Act, or in this section, or in this group of sections¹.

It is common in Acts of Parliament to use 'such' as a demonstrative, equivalent to 'the' or 'that.' But this departure from the English of ordinary life seems unnecessary, and often causes confusion where the expression 'such . . . as' has to be used in the same context.

It is also common to use the expression 'the same' when referring to an antecedent or to antecedents. But this form of expression would be considered clumsy or archaic in ordinary English, and, as used in Acts of Parliament, not infrequently slurs over a looseness of reference.

An Act of Parliament should be treated as always speaking. The idea on which this rule is based is, according to Lord Bowen, that a code on some particular subject is being constructed, and so, when the present tense is used, it is used, not in relation to time, but as the present tense of logic².

An Act of Parliament is intended to confer rights and impose duties. It should be made clear on whom the rights are conferred and the duties are imposed. For this purpose, as a rule, the active form ('may do' or 'shall do') should be used, and the passive form ('may be done' or 'shall be done') should be avoided.

Lastly, the provisions of the Interpretation Act, 1889³, must be carefully borne in mind.

Penalties
and
other
sanctions.

A right or duty is incomplete without what is commonly called a sanction, that is to say, the evil which may attend a violation of the right or a breach of the duty. 'For it is but lost labour to say "Do this, or avoid that," unless

¹ See *re Cambrian Railway Company's Scheme*, 3 Ch. 278, 293.

² *Ex parte Pratt* (1884), 12 Q. B. D. 340.

³ Printed below, p. 337.

we also declare "This shall be the consequence of your non-compliance¹." The sanction may be either civil or criminal, or both. Where a civil sanction only is required the courts will usually have power to apply the appropriate remedy, without express words. And the enactment should be so expressed as to give the right, not the remedy, to say that a person may do a particular thing, not that he may bring a particular action or obtain from the court a particular order. In some cases, however, it may be necessary to enlarge the jurisdiction of a court, such as a county court, for the purpose of bringing the enforcement of a right or duty within that jurisdiction. And in other cases it may be necessary to devise or specify a particular form of remedy. But in such cases the details of procedure should be left to be regulated by rules of court. The rules as to the criminal sanction are different. If it is proposed by a Bill to make an Act penal, then the criminal sanction should be imposed expressly by the Bill, for it is not desirable to rely on the doctrine that any breach of an Act of Parliament is a misdemeanour. Nor is it satisfactory to enact in express terms merely that the breach shall be a misdemeanour. For at common law a misdemeanour can be punished by *unlimited* fine or imprisonment, but the imprisonment cannot be accompanied by hard labour.

Where a duty is imposed on a public authority, it should be considered whether the duty is to be enforceable by the intervention of a superior administrative authority, such as a Government department, or by *mandamus*, or by both².

Care must be taken that the penalties imposed are sufficient but not excessive. The temptation to include several different offences in the same clause or to impose the same penalty for them should be avoided, unless it is clear that they are of the like nature and gravity. In some cases, for instance, guilty

¹ Blackstone, *Commentaries*, i. 57.

² See, e. g., s. 229 of the Public Health Act, 1875, 38 & 39 Vict. c. 55. and consider the remarks in *Pasmore v. Oswaldtwistle Urban Council*, A. C. [1898] 387.

CH. XI. knowledge, the '*scienter*,' ought to be an essential element of an offence; in other cases not.

Expenses. Where the administration of a measure will require new staff or additional expenditure, care must be taken that due provision is made for these purposes.

Rules of interpretation. Regard should be had to the general rules for the interpretation of statutes, as laid down in the ordinary textbooks. Among the most important of these are—

1. The rule that an Act must be read as a whole. Therefore the language of one section may affect the construction of another.
2. The rule that an Act may be interpreted by reference to other Acts dealing with the same or a similar subject matter. Hence the language of those Acts must be studied. The meaning attached to a particular expression in one Act, either by definition or by judicial decision, may be attached to it in another. And variation of language may be construed as indicating change of intention.
3. The general rule that special provisions will control general provisions.
4. The similar rule that where particular words are followed by general words (horse, cow, or other animal), the generality of the latter will be limited by reference to the former ('*Eiusdem generis*' rule).
5. The general rule, subject to important exceptions, that a guilty mind is an essential element in a breach of a criminal or penal law. It should, therefore, be considered whether the words '*wilfully*' or '*knowingly*' should be inserted, and whether, if not inserted, they would be implied, unless expressly negatived.
6. The presumption that the legislature does not intend any alteration in the rules or principles of the common law beyond what it expressly declares.
7. The presumption against an intention to oust or limit the jurisdiction of the superior courts.

8. The presumption that an Act of Parliament will not operate beyond the United Kingdom. Ch. XI.
9. The presumption against any intention to contravene a rule of international law.
10. The rule that the Crown is not bound by an enactment unless specially named.
11. The presumption against the retrospective operation of a statute, subject to an exception as to enactments which affect only the practice and procedure of the courts¹.
12. The rule that a power conferred on a public authority may be construed as a duty imposed on that authority ('may' = 'shall').

It should be considered whether the regulations laid down in an Act will be construed as imperative or as merely directory. Care must be taken not to frame the language in such a way as to make non-compliance with unessential requirements invalidate the proceedings.

Special heed should be paid to the transitional arrangements consequential on the passing of an Act. It must be considered how the new law will affect existing officers, rights, liabilities, and proceedings, and such provisions must be inserted as are necessary for adapting the old state of things to the new. In some cases it may be necessary to confer on a central or local authority a power to make the necessary adaptations².

Special considerations apply to Consolidation Bills³. The object of a Consolidation Bill is to combine in a single measure enactments relating to the same subject-matter, but scattered over different Acts, and thus to improve the form, without altering the substance, of the law.

For this purpose mere paste and scissors consolidation seldom suffices. Its result would be, in many cases, alteration of meaning. It also tends to prolixity and ambiguity.

¹ See *Young v. Adams*, A. C. [1898] 469.

² The recent Local Government Acts and the London Government Act, 1899, will supply illustrations of the kind of provisions which are needed where new authorities take the place of existing authorities.

³ See above, Ch. VII.

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Literal reproduction often means substantial alteration. An Act of Parliament speaks with reference to the time at which and the circumstances under which it is passed. The language of three hundred or even of fifty years ago would often have an entirely different meaning if reproduced in an Act of the present day. The mere collocation of enactments of different dates alters the sense.

The enactments to be reproduced are often unduly prolix, and even where that is not so, the net result of a long series of amendments of the law can frequently be summed up very briefly.

The language of different Acts, even when they relate to the same subject-matter, is often not uniform. The same expressions are differently defined, and are given different meanings by the context. Hence alteration of language is necessary for the sake of clearness and consistency.

For all these reasons the work of consolidation can seldom be effected mechanically. The law has to be rewritten in such a form as to preserve its substance whilst altering its form. But care should be taken to preserve the material language unless there is any special reason for altering it, and specially to preserve, if and as far as possible, expressions on which a judicial construction has been placed or which have acquired a particular signification in practice.

It is, however, rarely possible to reproduce existing statute law without some slight alteration of substance. Ambiguities and inconsistencies have to be removed; modern machinery has to be substituted for machinery which has become obsolete or inconvenient. Alterations of this kind may properly be described as necessarily incidental to the process of consolidation; and, if their nature is fully and fairly explained, objection will probably not be raised on the ground that the measure goes beyond the proper scope of consolidation. Every consolidation Bill should, therefore, be accompanied by a memorandum and notes on clauses showing what alterations of this kind are made by the Bill.

In order to make sure that the existing enactments have been fully reproduced, and that nothing has been overlooked, a reference to each section reproduced should be given on the margin of each reproducing clause, and there should also be a separate table of the enactments repealed and superseded, showing where each repealed section is reproduced, or if it has not been reproduced, on what ground it has been omitted. There will thus be a double check on the accuracy of the consolidation. The marginal reference will show whence the new law is derived ; the table of comparison will show how the existing law is accounted for ¹.

Consolidation should not, as a general rule, be combined with substantial amendment of the law. Where a Bill aims both at consolidation and at amendment it is practically impossible to confine in Parliament proposals for amendment to the new provisions as distinguished from those provisions which are merely reproductions of existing law. The whole Bill becomes open to criticism and amendment in committee, and if the subject is in the least degree contentious the chances of passing it are very small.

Where amendment of substance as well as of form is needed, one of three courses may be adopted. An amending Bill may be introduced and, when passed, followed by a Consolidation Bill. Or, when the provisions of the amending Bill are past the committee stage, they may be embodied in a consolidation Bill. This course was adopted with the Housing of the Working Classes Act, 1890, and the Public Health (London) Act, 1891, but is attended by a good many risks. Or, lastly, it may be more expedient to make consolidation precede substantial amendment, an assurance being given that re-enactment of the existing law is not in any way to prejudice or preclude future amendments. The fact is that simplification of the form of the law facilitates amendments of substance.

There will often be difficulty in determining the boundary lines of a Consolidation Bill, in saying what enactments it

¹ See the form of table in Appendix I to Ch. XII.

CH. XI. should or it should not reproduce. Each Bill of this kind ought to be regarded as a chapter in an ideal code, and considered in its relations to kindred branches of the law. It should be considered, before a provision is inserted, whether it might not find a more appropriate place in another chapter; and before a provision is omitted, where else it could be better placed if kindred branches of the law were consolidated. But theoretical considerations of this kind must often give way to considerations of policy. It is frequently better to have incomplete consolidation than no consolidation at all, and to avoid enactments which it would be dangerous under existing circumstances to touch.

The headings of the Index to the Statutes will often suggest what enactments should be combined in a single Consolidation Bill. It will be convenient to have a separate table showing what enactments, though related to the subject-matter of the Bill, are left outstanding, and for what reasons they are so left.

Refer-
ential
legisla-
tion
(in the
wider
sense).

Referential legislation, or legislation by reference, is a favourite subject of invective with critics of parliamentary procedure. But the phrase has more than one meaning, and it may be worth while to consider the different senses in which it is employed. In its widest sense it includes any reference in one statute to the contents of another. In a narrower sense it means the application, not by express re-enactment, but by reference, of the provisions of one statute to the purposes of another¹.

All legislation is obviously referential in the widest sense. No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or a fragment of a chapter, of a body of law. It involves references, express or implied, to the rules of the common law, and to the provisions of other statutes bearing on the same subject. If the leading rules of

¹ As, e.g., where the provisions of the Municipal Corporations Act with respect to municipal elections are applied to county council elections.

the common law were codified, that is to say, expressed in a concise, orderly, and authoritative form; if the provisions of the statute law were consolidated, that is to say, if the statutory provisions on each subject were collected and arranged in a single Act; the outside knowledge required for the interpretation and application of particular Acts would be more easily acquired. But under existing conditions the complete effect of a short and apparently simple enactment often cannot be grasped without a careful search through textbooks and the Statute Book. The conservative character of English legislation increases the difficulty of the task. The English legal and administrative system resembles an ancient and venerable building, which has been often repaired, altered and enlarged, but has never been pulled down and rebuilt. There has been no revolutionary break with the past. When a new departure is resolved upon, it is usually made in a cautious and experimental fashion. The adoption of the experiment is made permissive in the first instance, or its application is confined to a limited area, to a particular trade or occupation, or to a restricted set of circumstances. The new rules are patched and altered as defects appear, the area of experiment is gradually enlarged, and it is not until the new law has been tested by adequate experience that its application is made general or compulsory¹. Until the new system has acquired a comparatively final form, until the difficulties raised by its introduction have subsided or been overcome, until it has been generally accepted as part of the settled law of the country, there is a natural indisposition to stir burning questions by proposing to repeal the existing enactments and fuse them into a new and comprehensive Act. And it must be admitted that the task of consolidation is often postponed after these grounds for delay have ceased to operate. These

¹ Consider, for instance, the course of legislation with respect to public health, factories, and education, and the enactments which preceded and led up to the change in the law of evidence made by the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36).

CH. XI. circumstances, coupled with an indifference to style and finish, characteristic also of English art and English literature, are sufficient to explain the disorderly condition of the Statute Book, which is so often made a subject of reproach by legislators and judges as well as by scientific writers on the law. But whilst the justice of their criticisms may be admitted, it must be borne in mind that the national characteristics which are responsible for these defects have much to do with the vitality and the efficacy of English institutions.

Amend-
ing legis-
lation.

It follows that the English legislator rarely, if ever, finds himself in a position to inscribe a brand-new law on a blank sheet of paper. The utmost that he can usually aim at is to remove some blemish from, or to alter or add to some provisions of, an existing law or institution ; in other words, to pass an amending Act. And the best mode of framing an amending Act, so as to be intelligible both to those who have to pass it and to those who have to observe and administer it, is often a problem of considerable difficulty.

From the point of view of administration the most convenient plan is to repeal the old law, and re-enact it with the necessary modifications. But the law to be amended is often contained in more than one Act, and experience has shown that attempts to combine consolidation with substantial amendment are rarely successful. Even where there is only one Act that need be amended, a proposal to repeal the whole Act for the purpose of making a single amendment, or two or three amendments of minor importance, is open to many objections. It gives the proposed legislation an appearance of being more important and more extensive in its scope than it really is, and the prudent legislator will usually prefer to minimize rather than magnify his proposals. It obscures, and distracts the attention of the legislature from, the immediate point or points in issue. It throws the whole law into the crucible, exposes to amendment, not merely the particular provisions which the introducer of the Bill desires to alter, but all other provisions of the law which appear to be in any

way open to criticism, and consequently multiplies the points of attack and the obstacles to progress in Committee. The proposal to repeal and re-enact, not the whole of an Act, but merely a particular section of an Act, is often open to similar objections from a parliamentary point of view. For the section may embody a principle, or may contain provisions, which the introducer of the Bill does not desire to question, but which cannot escape criticism if the whole section is proposed for repeal.

In some cases also the law embodied in the new enactment is intended to apply only to events and transactions happening after a particular date, leaving events and transactions happening before that date to be governed by the old law, and in such cases, if the old law is repealed, it is often not easy to express the precise operation of the law with respect to occurrences at different dates¹.

For all or some of these reasons the promoter of an amending measure usually has to content himself with altering the form or substance of existing sections, or adding sections to an existing Act.

If, for any of these reasons, the method of repeal or re-enactment is not adopted, the next most convenient course, from the point of view of administration, is to express the amendments in a technical form, like notices of amendments to Bills in Parliament, or like errata or addenda in books, that is to say, in the form of directions to strike out particular words or sentences from an enactment, and to add others. This is the form frequently adopted by the Indian legislature. It has considerable advantages. It enables

¹ For instance, the series of Acts known as Locke King's Acts deal with the liability of personalty of deceased person to pay the debts charged on his realty. The first Act, passed in 1854 (17 & 18 Vict. c. 113), saved all rights existing before 1855. The second, passed in 1867 (30 & 31 Vict. c. 69), amended the first, but applied only in the case of persons dying after 1867. The third, passed in 1877 (40 & 41 Vict. c. 34), applied only in the case of persons dying after 1877. If each Act had repealed its predecessor it would have been difficult to express the law which it left unaffected.

CH. XI. a clerk to note up, almost mechanically, the alterations in the statute law, by simply striking out or writing in the necessary words. Thanks to this method of amendment, the Legislative Department of the Government of India is able to issue periodically revised editions of the most important Indian Acts, which embody the amendments up to date, and thus, for many purposes, take the place of repealing and consolidating Acts. The substitution is not completely satisfactory, partly because it is always necessary to bear in mind the date from which the new enactments incorporated in the old law began to operate, and partly because, for this and other reasons, if a case on the amended Act comes into court, the judge or magistrate often finds it necessary to inspect the original Acts instead of relying on the reprint. But for purposes of practical administration such reprints are of great convenience.

On the other hand, from the parliamentary point of view, an amending Bill drawn in the technical form adopted by the Indian legislature is open to serious objections. In the first place it is absolutely unintelligible without the text of the enactments which it is proposed to amend, and even if these objections can be removed by means of an explanatory memorandum¹, a Bill thus drawn is, as any one who has watched attempts to amend parliamentary amendments will readily understand, extremely difficult to amend, and thus presents unreasonable obstacles to legitimate discussion in Committee². For these reasons the technical method of amendment is hardly ever adopted in England except in the case of non-contentious measures³.

Under these circumstances, the ordinary mode of amending

¹ In India a Bill is always accompanied by a printed 'Statement of Objects and Reasons.'

² In India the details of every Bill are, as a rule, settled by a small Select Committee, and, in the case of the Governor-General's Council, the law member of Council, who is always the Chairman of the Select Committee, has a very free hand in moulding the shape of amendments.

³ For instances, see below, pp. 274, 275.

an Act is to state in the amending Bill the effect of the amendment proposed to be made. This is the commonest mode, and for parliamentary purposes is the most convenient, because under it every member of Parliament who knows anything of the subject, learns at once the nature of the amendment proposed. And in some cases, where the amendment virtually overrides a large portion of the existing enactment, it is practically the only possible method¹.

There are cases in which it may be possible to combine what may be called the popular and the technical mode of amendment, by stating at the beginning of a clause the substance of the amendment proposed to be made, and adding, in a separate subsection or otherwise, technical amendments, which make the requisite alterations in the language of the enactment amended².

Where the technical mode of amendment has been adopted, it has sometimes been accompanied by a direction to print the amended Act with the necessary alterations, so that a King's Printer's copy of the Act as amended may be given in evidence. This has been done in the case of the Naval Discipline Act and the Army Act³. If this form of amendment should be adopted on a large scale, it would probably be necessary to appoint a Parliamentary Committee, or some similar authority, to supervise the printing of the amended Act, since questions might possibly arise as to the precise mode in which effect should be given to the directions for printing.

It will have been seen that all amending legislation is referential in the sense that it is unintelligible without reference to other enactments. But by referential legislation

Referential legislation (in the narrower sense).

¹ For instance, the amendments made by ss. 16-19 of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), overrode a number of existing enactments, and could not have been made by means of detailed amendments.

² See, e.g., the Naval Discipline Act, 1884 (47 & 48 Vict. c. 39, s. 2), the Friendly Societies Act, 1887 (50 & 51 Vict. c. 56, s. 7), and the Finance Act, 1897 (60 & 61 Vict. c. 24, s. 3).

³ See 47 & 48 Vict. c. 39, 48 Vict. c. 8, and below, p. 275.

CH. XI. in the narrower sense is meant legislation of which the object is, not to amend an existing enactment, but to apply its provisions to a new set of circumstances¹.

There are two cases in which this mode of legislation is clearly legitimate and appropriate.

The first case is where the general provisions of one Act are, by later provisions of *the same Act*, 'adapted' to special areas or special circumstances. The commonest case of such adaptation is that of Acts extending not merely to England, but also to Scotland or Ireland, or both. The method usually adopted in these cases is to frame the Bill with reference to English circumstances, and then to place towards the end of the Bill a clause or clauses 'applying' or 'adapting' the provisions, with the necessary modifications, to the circumstances of Scotland or Ireland. These adapting clauses are usually left to be settled by the draftsmen attached to the Scotch and Irish offices. Similar adaptations will often be required for places under an exceptional form of government, such as London. From the parliamentary point of view this mode of legislation presents obvious advantages by removing complications and exceptions from the main clauses, and from the administrative point of view it is not open to the objection of necessitating reference to the contents of another Act. In some cases, however, the number and complexity of modifications required to make an English Act applicable to Scotch or Irish circumstances may raise a presumption in favour of separate legislation.

The second case is that of Acts which are drawn for the express purpose of being applied to other enactments. The

¹ The line between these two classes of legislation is often difficult to draw, as in the case of enactments which are applied, in the first instance, to a limited class of cases, but of which the scope is afterwards extended. Thus, the Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34), was intended for the regulation and preservation of disused burial grounds and other open spaces in London. Its provisions were subsequently extended to the regulation of similar open spaces in the country (50 & 51 Vict. c. 32). The result is a singularly difficult complex of enactments.

most conspicuous case of such Acts is supplied by the Clauses Consolidation Acts of 1845. The development of railway and joint-stock enterprises in the third and fourth decades of the nineteenth century gave rise to a vast number of private Acts, each containing provisions closely resembling, and often copied from, each other. With the view of reducing the length of these Acts and of securing greater uniformity in their provisions, Mr. Booth, when counsel to the Speaker of the House of Commons, drew a set of Acts 'for the purpose of consolidating in one Act certain provisions usually contained in' the special Acts relating to the formation of companies, the taking of land, and the construction of railways¹. These Acts have no independent legislative force of their own, but are statutory 'common forms,' required, either by the terms of the Act itself, or by the Standing Orders of Parliament, to be 'incorporated' in future Acts. They have been of great use in securing uniformity in private Bill legislation, and in saving the time of Parliament. But it would probably have been better if they had been enacted in the form of substantive law, with provisions for allowing their modification by special legislation in proper cases.

The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), commonly known as Jervis's Act, is another instance of an Act intended to supersede, and prevent the repetition of, corresponding provisions in particular Acts. The statutes of the eighteenth, and of the first half of the nineteenth, century frequently gave magistrates in petty sessions jurisdiction over minor offences, and when they did so, set out, often at con-

¹ The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17), the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19), the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33). The system has been subsequently extended to the subjects of Towns Improvements, Police, Waterworks, Gasworks, Harbours, Docks and Piers, Markets and Fairs, Cemeteries, Commissioners and Electric Lighting (62 and 63 Vict. c. 19).

CH. XI.

siderable length, provisions as to the procedure to be observed. The Act of 1848 generalized these provisions and embodied them in a separate code, and since that time it has been sufficient, when giving magistrates jurisdiction over such offences, to refer to the provisions of the Summary Jurisdiction Acts, i. e. the Act of 1848 as subsequently amended. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 51) expressly authorizes the use of simple legislative forms for indicating where the provisions of the Summary Jurisdiction Acts are to apply.

The Arbitration Act, 1889 (52 & 53 Vict. c. 49), is another general procedure Act to which reference may be made with obvious propriety.

Incorporation of the Clauses Acts, reference to the Summary Jurisdiction Acts or the Arbitration Act, are methods of legislation directly contemplated when those Acts were passed. A further step in 'referential legislation' is taken when an enactment is applied to circumstances different from those contemplated when it was passed. For instance, the Lands Clauses Acts were framed with special reference to railway companies and other bodies seeking power to take lands under the authority of local and general Acts for commercial purposes. But these provisions are applicable, with modifications, to cases where a local authority takes land for public purposes under powers conferred by public general Acts, and they have been so applied, both by the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 176), and by other Acts¹. Probably this method of legislation was the most convenient, not only from the parliamentary but from the administrative point of view. More doubtful is the propriety of applying the provisions of the Public Health Acts with respect to the taking of land to cases where land is to be taken by a local authority for purposes other than sanitary. This mode of legislation involves a double reference, first to the Public Health Acts, and then to the Lands Clauses Acts. On the

¹ See below, p. 317.

other hand it must be remembered that the officers of the local authorities who have to work these provisions are familiar with the procedure under the Public Health Acts, so that the double reference does not in practice involve much difficulty.

For similar reasons it is often convenient to apply by reference the provisions of the Public Health Acts with respect to the making and publication of by-laws, and this application does not involve a double reference.

The case in which the method of referential legislation has been most extensively employed, and in which its employment has been most severely criticized, is probably that of the recent Local Government Acts. The problem with which the Local Government Act, 1888, had to deal was one of exceptional complexity and difficulty. The main objects aimed at were: first, to set up new elective bodies for counties, and secondly, to transfer to those bodies certain administrative functions exercised by other authorities. The transfer necessarily involved references to the several enactments under which the duties and powers to be transferred were exercised, and probably could not have been effected in any other manner. As to the constitution and election of these new bodies, the leading notion was to make them resemble as nearly as possible the councils of municipal boroughs. The law relating to the constitution and election of municipal councils had recently been reduced into a fairly compact and intelligible form by the passing of the Municipal Corporations Act, 1882—a great measure of consolidation. A large number of persons throughout the country were familiar both with the contents and with the practical working of this law. Under these circumstances it was enacted that the municipal law should apply to county councils subject to certain modifications. This method of legislation possessed considerable advantages, both from the parliamentary and from the administrative point of view. It presented to Parliament a single issue, namely, whether the

CH. XI. municipal system should be adopted or not. If the municipal provisions had been repeated in the new Bill, they would have run to an inordinate length, every detail of them would have been open to discussion and amendment, and the result of the discussion would probably have been to introduce a large amount of variation, both in language and in substance, between the law applicable to borough councils and the law applicable to county councils, and thus to have destroyed that uniformity of law and procedure which so materially facilitates administration. Unfortunately the Municipal Corporations Act, 1882, is not, and could not at the time it was passed have been made, complete in itself. It involves a reference to other Acts, such as the Ballot Act, 1872¹, which regulates the procedure at municipal elections. Therefore the application of the Municipal Corporations Act involved a further reference to other Acts. Moreover, the application of the new law to London, which had an exceptional administrative and judicial system of its own, involved serious and complicated modifications of the enactments to be applied.

Similar considerations to those which influenced the framing of the Local Government Act, 1888, influenced also the framing of the Local Government Act, 1894, which set up parish and district councils, of the Local Government (Ireland) Act, 1898, which extended the English system to Ireland, and of the London Government Act, 1899, which substituted councils for vestries and district boards in London.

It cannot be denied that in all these cases the method of legislation by reference has been strained beyond the limits which would be justifiable under ordinary circumstances. But probably every one who was concerned with the passing of those Acts would hold that no other method could have been adopted with any prospect of success.

¹ The Ballot Act, 1872, is still, after the lapse of more than a quarter of a century, a temporary Act, annually renewed by the Expiring Laws Continuance Act. But it could not be repealed or suspended without destroying a vast body of law which is dependent on its provisions. It is surely time that the Act should be made permanent.

In some cases an attempt has been made to diminish the inconveniences of referential legislation by scheduling to the Bill such provisions of any other Act as are incorporated by reference¹. This method, apart from its adding to the length of the Act, is open to the objection that an amendment of the enactments applied may not extend to those enactments, so far as they are incorporated in the Act, and thus the uniformity of procedure, which is an object of incorporation, is destroyed. If, on the other hand, the amendment does so extend, the schedule becomes misleading². Moreover, when the amendments to be applied have been modified by subsequent legislation, it may be practically impossible to set them out in a schedule.

Where, as often happens, the enactments applied do not precisely fit the case to which they are applied, different modes of making the necessary modifications have been adopted. The best way, if it is practicable, is to set out the specific modifications in the Act. In some cases a general declaration that the enactments are 'to apply with the necessary modifications' or 'as if they were in terms made applicable to this Act' has been considered sufficient. In other cases it has been found necessary to delegate to a Government Department the power of making by rules the requisite modifications and adaptations³.

¹ For examples, see the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); the Seal Fishery Acts, 1891, 1893, and 1894 (54 & 55 Vict. c. 19; 56 & 57 Vict. c. 23; 57 & 58 Vict. c. 2).

² Thus the sections of the Public Health Acts relating to London which were scheduled to the Housing of the Working Classes Act, 1890, were repealed and re-enacted with modifications by the Public Health (London) Act, 1891, and that Act contained a provision (s. 142(7)), that where any such provision was referred to in any other Act that Act should be read as if the corresponding provisions of the Act of 1891 were referred to instead of the repealed provisions. Consequently the schedule to the Act of 1890 is apt to mislead.

³ See the Elementary Education Act, 1870 (33 & 34 Vict. c. 75, s. 37), the Local Government Act, 1894 (56 & 57 Vict. c. 70, s. 48), the Registration (Ireland) Act, 1898 (61 & 62 Vict. c. 2), the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37, ss. 98, 104, 105). The powers

It will have been seen that legislation by reference may assume different forms, and that it is difficult to lay down a hard-and-fast rule as to the cases in which and the extent to which the different forms may with propriety be employed. What the draftsman has to aim at in each case is as much simplicity and clearness as is consistent with parliamentary exigencies. And in justice to him it must be borne in mind that referential legislation rarely, if ever, saves him trouble. It would in most cases be the easiest course for him to set out the enactments to be adopted with such minor modifications as may be required for applying them to the circumstances contemplated by the Bill, instead of referring to those enactments and formulating the modifications which their application and incorporation require. The framing of such modifications requires extreme care, and is often a matter of great difficulty. Under the pressure of superior authority the draftsman labours to be brief. It is no marvel that he is sometimes obscure.

The conclusion seems to be that the method of legislation by reference is in many cases unavoidable, but that where it has been adopted, the proper course is to throw the law, as soon as practicable, into a simpler and more intelligible form by passing a measure of consolidation.

Schedules,
Rules,
and
Forms.

The increasing complexity of modern administration, and the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion, have led to a more extensive use of the machinery of schedules, and a more extensive exercise of the power of delegating legislative powers to executive authorities. The tendency of modern parliamentary legislation is to place in the body of an Act merely a few broad general rules or statements of principle, and to relegate all details either to schedules or to statutory rules¹. This tendency is liable to abuse, and in some recent

given by ss. 104 and 105 of the Local Government (Ireland) Act are unusually wide.

¹ See Ch. III.

Acts, e. g., the Workmen's Compensation Act, 1897, the proper line of division between matter which ought to be dealt with in the body of an Act and matter which may with propriety be relegated to a schedule, appears to have been, owing doubtless to parliamentary exigencies, imperfectly observed. But, if due limits are observed, the graduation and distribution of enactments which may be effected by means of schedules and statutory rules tends to facilitate both discussion in Parliament and subsequent administration. It facilitates discussion because it concentrates attention on the main question, and prevents waste of time on minor and subordinate issues. It facilitates administration, because every administrative change is in the nature of an experiment; the precise mode in which it will work out, the exact means by which its objects can best be effected, cannot be determined with certainty beforehand, and consequently the machinery must be made elastic. This elasticity can best be given by allowing the details to be worked out on the general lines laid down by the supreme legislature, either by statutory rules, or by official practice subject to the check of public opinion and questions in Parliament.

As to the precise mode in which the subject-matter of a statute should be distributed between the body of an Act and its schedules, as to the amount of discretion which can safely and properly be left to be exercised either by subordinate legislation or by executive action, no definite rules can be laid down. For the settlement of these questions in each particular case there is need of much judgement, experience, and knowledge of the traditions and ways of Parliament. The minister or other member in charge of a Bill will have to feel his way, and be guided by the temper of the House or the Committee, at the particular moment, or with reference to the particular subject-matter in hand. An attempt to hide away controversial matter in a schedule is usually found to be bad policy.

It must be remembered that a schedule is as much part of

CH. XI. an Act as the sections by which it is preceded¹, and in the absence of special provisions can only be altered in like manner. The plan has sometimes been adopted of making a schedule alterable by Order in Council or by statutory rules. But this plan is open to objection, both on principle, because what Parliament has laid down Parliament alone should alter, and on grounds of practical convenience, because a repealing order or rule is more liable to be overlooked, and is less easy to find, than a repealing Act, and the retention of a schedule in the Statute Book after it has been repealed or superseded by some subordinate authority is apt to mislead.

At a time when Acts of Parliament were much more minute and detailed in their provisions it was not unusual to schedule to an Act the forms to be observed in its administration. But this practice is rarely adopted now. Experience has shown that serious inconvenience may be caused by stereotyping details of this kind, and that they had better be left to be 'prescribed' by rules or settled by practice. But a draftsman will often find it useful to test the adequacy of his clauses and rules by considering what forms will be required for carrying them into effect.

The limits within which, and conditions under which, legislative powers may and should be delegated to executive authorities, by means of a power to make statutory rules, have been considered in Chapter III. The draftsman, in framing a clause which gives power to make rules, should consider, in consultation, if possible, with the authority which will have to exercise this power, what are the principal matters for which rules will be required, and frame his clause accordingly. It is not safe to trust to a general power of making rules 'for carrying into effect the provisions of this Act,' though general words to that effect should be added, in order to cover any matters which may have been overlooked.

Title. The officers of the House are responsible for seeing that

¹ See *Attorney-General v. Lamplugh* (1878), 3 Ex. D. 229.

the provisions of a Bill are all comprised within the terms of the title of the Bill. But an objection that they are not so comprised may be taken by any member, and if the objection is allowed by the Speaker, the order for second reading must be discharged. As to what a title will include, see, among other things, the ruling of the Speaker, May 3, 1894, on the effect of the words 'and for purposes consequential thereon.'

In framing the title care must be taken to make it wide enough to cover all the provisions of the Bill, and at the same time not so wide as to allow of the proposal of amendments which are irrelevant to the real substance of the Bill. For although the fact that an amendment is within the title of the Bill does not prevent the Chairman in Committee from ruling the amendment out of order, it is less easy to propose amendments which are irrelevant or beyond the scope of the Bill if they are clearly excluded by the title.

The title of an Act of Parliament now forms part of the Act, and since 1854 has been capable of amendment by the House. Consequently it may, like the preamble, be referred to as throwing light on the construction of the Act¹.

As a rule a preamble is unnecessary in a public Bill. Preamble. Where the object is merely to describe briefly the reason for and the intended effect of the proposed legislation, that object can often be better obtained by prefixing a short explanatory memorandum to the Bill. Such a memorandum should state concisely the existing law, the reasons for amendment, and the effect of the proposed amendments. A local Bill must always have a preamble, the recitals in which must be proved. And when a public Bill resembles in character a local Bill, a preamble will usually be necessary. Where, for instance, an enactment deals with a special set of facts, it will usually be convenient to state those facts in a preamble².

¹ See *Powell v. Kempton Park Racecourse Co.* [1897], 2 Q. B. 289; *Fielding v. Morley Corporation* [1899], 1 Ch. 1.

² See, e. g., the London Coal Duties Abolition Act, 1889 (52 & 53 Vict. c. 17) and the Canada (Ontario Boundary) Act, 1889 (52 & 53 Vict. c. 28).

CH. XI. A formal preamble is sometimes convenient for the purpose of introducing and explaining a phrase which is to be used in the course of the Bill, especially if the modern practice is followed of placing the definition clause near the end of the Bill, e.g., 'Whereas it is expedient to amend the Act (hereinafter referred to as the principal Act).'

A Money Bill, i.e. a Bill of which the main object is to grant money, and which must therefore originate in a Committee of the House of Commons, has a special form of preamble, beginning 'Most Gracious Sovereign, We, Your Majesty's most dutiful and loyal subjects, &c.'¹

Formal
and
saving
clauses.

The formal and saving clauses of a Bill are, according to recent practice, usually placed at the end of a Bill. There are several advantages in this course. The House, when called upon to consider the Bill in Committee, proceeds at once to the substantive proposals of the measure, instead of having to pass or postpone formalities. The saving clauses and definitions cannot be properly settled until the substantive provisions have been settled, and therefore, even if they are placed at the beginning of the Bill, their discussion usually has to be postponed until the other clauses are passed. And if some of the formal clauses stand more conveniently at the end of the Bill, the others had better be placed in their neighbourhood.

Under Standing Order 45 of the House of Commons the precise duration of every temporary law must be expressed in a distinct clause at the end of the Bill.

¹ See, e.g., 53 & 54 Vict. c. 8.

CHAPTER XII

STATUTORY FORMS

DRAFTSMEN of Acts of Parliament cannot, like conveyancers, use common forms. If a draftsman inserts a clause or a provision in his Bill merely because he has found it in some other Act and thinks it may be useful, he will certainly come to trouble. On the other hand Parliament has great respect for precedents, and the argument that a proposed provision follows the lines of an enactment which has been applied on a previous occasion to similar circumstances will always have great parliamentary weight. It is therefore as well for the draftsman to know what forms have been employed in circumstances which are likely to recur. But the forms printed in this chapter are mere specimens of forms which happen to have been adopted. They are incomplete, they are capable of improvement, they must not be followed blindly, and their applicability to each case must be carefully considered. The object of the notes is to supply information on points which have to be borne in mind in framing public general Acts of Parliament. They are intended to put draftsmen on the track of things they may want to know, and should be carefully verified by those who use them. In such a mass of minute detail it is almost impossible to avoid small slips and inaccuracies.

TITLE.

Forms.

[Draft of] a Bill intituled an Act to amend, &c.

This is the form of a House of Lords Bill.

Ск. XII. [Draft of] a Bill to amend, &c.

This is the form of a House of Commons Bill. When a Bill is introduced 'in dummy,' i. e. before it is finally printed, there is handed to the clerk at the table a piece of paper containing the long title of the Bill and the description by which the Bill is to appear in the Notices and Votes. This description, which by the members and officers of the House is commonly called the short title, should be sufficiently distinctive, and should be identical with the italic heading at the top of each page of the Bill, but need not correspond exactly either to the long or to the short title enacted in the Bill.

ENACTING FORMULA.

Forms.

Be it [therefore] enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The word 'therefore' is only inserted where there is a preamble. The existing formula of enactment was gradually developed from a form which implied that legislative authority was vested in the King alone. The reference to the 'authority' of the Lords and Commons is said to have appeared first in an Act of 1433 (11 Hen. VI), and became general at the beginning of the reign of Henry VII. [See Stubbs, *Const. Hist.* ii. 591, Anson, *Law and Custom of the Constitution*, i. 214-217.]

FORMAL CLAUSES.

Forms.

Short
title.

. This Act may be cited as the Act, 1901, [and
the principal Act and this Act may be cited together as the
 Acts 18 and 19] [*or* and may be cited with
the Acts].

According to modern practice the House of Lords requires every Act of Parliament to have, for facility of reference, a short title in addition to its formal long title. When a Bill has been introduced to amend existing Acts, the opportunity has often been taken to give short titles to the Acts amended. But now by the Short Titles Act, 1896 (59 & 60 Vict. c. 14), which supersedes and supplements the previous Act of 1892 (55 & 56 Vict. c. 10), short titles have been given to all the public general Acts

passed since the date of the union with Scotland (as well as to some earlier Acts), which had not been previously given short titles. The Act also gives collective titles to several groups of Acts, and declares that if a future Act is authorized to be cited with any of these groups, the group shall be construed as including it. In order to obtain the benefit of this provision it will often be convenient to add to the short title the words 'and may be cited with the _____ Acts.'

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The short titles given by subsequent Acts, including the Short Titles Act, are noted in the second edition of the Revised Statutes, beginning at the fourth volume, and references to most of these titles will be found in the Index to the Statutes.

If an Act has not a short title, it ought, strictly speaking, to be referred to as 'an Act of the session of the _____ and _____ years of [His present Majesty], chapter _____, intituled An Act, &c.' Where the whole of the session was in the same regnal year the words 'the session of' can be omitted.

Where an Act of a Session extending over two regnal years receives the royal assent before the end of the first regnal year it is often cited by reference to that year only (e.g., 41 Vict. c. 14), and is necessarily so cited until the second regnal year begins. But after that date it seems more correct to refer to it as an Act of the Session held in both regnal years.

The omission of the title in the citation is authorized by s. 35 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), but may involve inconvenient consequences. There is then no clue to the subject-matter of the Act, and there is much risk of error in the event of the number of the chapter being misprinted.

Where, in the body of an Act, another Act is referred to by its short title, a reference to the session and chapter should be inserted in the margin. Otherwise it may be necessary to consult the Index to the Statutes of the year in order to find out the chapter referred to.

Short titles should be short. The following is a model to be avoided: 'The Fisheries (Oyster, Crab, and Lobster) Act (1877) Amendment Act, 1884.'

. This Act shall [so far as is consistent with the tenor thereof] be construed as one with the [principal] Act. Construction of Act.

The object of this clause is—

1. To secure that expressions having a particular meaning in the amended Act shall have the same meaning in the amending Act :
2. To secure that such expressions as 'this Act' when used in the amended Act shall be construed as including the amending Act.

Where an Act is to be construed as one with another Act, care must be taken that the definitions in the one Act are

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consistent with the definitions in the other, and, generally, that the language of the two Acts harmonizes. The provision as to construction should not be inserted without careful consideration of its effect. The courts usually construe Acts relating to the same subject-matter as if they were one Act¹, with the necessary modifications, and this provision makes it difficult for the courts to import the necessary modifications.

The 'short title' and 'construction' clauses are often combined, thus 'This Act may be cited as the Act, 18 , and [may be cited and] shall be construed as one with the Acts.' The addition of the words 'may be cited and' will attract the operation of s. 2 (1) of the Short Titles Act, 1896.

Provision
for em-
bodying
amending
Act in
principal
Act.

—(A.) (1) Every enactment and word of this Act which is expressed to be substituted for or added to any portion of the principal Act, shall form part of the principal Act, in the place by this Act assigned to it; and the principal Act, and all Acts, including this Act, which refer thereto, shall, after the commencement of and subject to the savings contained in this Act, be construed as if that enactment or word had been originally enacted in the principal Act in the place so assigned, and (where it is substituted for another enactment or word) had been so enacted in lieu of that enactment or word; and the expression 'this Act' as used in the principal Act [or this Act] shall be construed accordingly.

(2) A copy of the principal Act, with every such [substituted and added] enactment and word inserted in the place so assigned, and with the omission of the parts expressly repealed by this [or any other] Act, and with the sections and sub-sections renumbered in such manner as may be necessary in order to bring the same into conformity with this Act [or numbered in manner directed by this Act], shall be prepared and certified by the Clerk of the Parliaments, and deposited with the Rolls of Parliament, and the King's printer of Acts of Parliament shall print in accordance with the copy so certified all copies of the principal Act which are printed after the commencement of the Act.

(B.)—(1) The principal Act shall, as from the passing of

¹ See Hardcastle on *Statutory Law*, second edition, pp. 147 sqq.

this Act, take effect subject to the additions, omissions, and Ch. XII. substitutions required by this Act.

(2) Every [any] copy of the principal Act printed after the passing of this Act, by authority of His Majesty, shall [may] be printed with the additions, omissions, and substitutions required by this Act.

Form A. is suggested by s. 7 of the Naval Discipline Act, 1884 (47 & 48 Vict. c. 39), and Form B. by s. 18 of the Friendly Societies Act, 1887 (50 & 51 Vict. c. 56), and s. 27 of the Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50). These forms should not be used except in special cases, and are only applicable where the amending Act is drawn in an extremely technical form so as to make its language fit exactly into the Act which it amends. It is dangerous to adopt such a form where the amending Bill is likely to be the subject of discussion and amendment in Parliament. For similar forms, see s. 10 of the Titles to Land Consolidation (Scotland) Amendment Act, 1869 (32 & 33 Vict. c. 116); s. 1 of the Pensions Commutation Act, 1870 (33 & 34 Vict. c. 101); s. 14 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21); and s. 8 of the Army (Annual) Act, 1885 (48 Vict. c. 8).

. (A.) This Act shall not extend to Scotland or Ireland. Extent of Act.

(B.) This Act shall extend to the Isle of Man and to the Channel Islands, and the Royal Courts of the Channel Islands shall register this Act accordingly.

(C.) This Act shall extend to the whole of His Majesty's dominions.

Where the local operation of an Act is not specially limited or extended, either by express words or by implication, it extends to the whole of the United Kingdom, but not to any place outside the United Kingdom. (See *R. v. Jameson* [1896], 2 Q. B. D., p. 430.) The Channel Islands and the Isle of Man do not form part of the United Kingdom, but are, in Acts passed since January 1, 1890, included in the expression 'British Islands' (Interpretation Act, 1889, s. 18 (1)).

By virtue of 20 Geo. II. c. 42, 'England,' in an Act of Parliament, includes 'the dominion of Wales and the town of Berwick-upon-Tweed.' But many Acts are expressly declared to extend to Wales as well as England, and it is never safe to use the expression 'This Act shall extend [or apply] to England only.' Berwick-upon-Tweed is now part of the county of Northumberland.

Registration in the Royal Courts is the proper mode of promulgating an Act affecting the Channel Islands. See *In re States of Jersey* (1853), 9 Moore P. C. 185; 8 State Trials N. S., p. 285.

Parliament has power to make laws for any part of the King's dominions, but, as a rule, does not legislate for matters within the powers of a local legislature.

CH. XII. Parliament can legislate for offences committed by British subjects outside the King's dominions, and has done so in such cases as offences at sea, treason, murder and manslaughter, forgery and perjury with reference to proceedings in British courts, bigamy, slave trade offences, and offences under the Explosive Substances Act, 1883. But, as the criminal jurisdiction of British courts is primarily territorial, it may be necessary in such cases to confer jurisdiction in express terms.

In some cases it is necessary to pass an Act empowering a Colonial legislature to legislate, either for the purpose of enabling them to overrule an Imperial Act, or for the purpose of giving the Colonial law effect outside the territorial limits of the Colony, or for both these purposes. For instances of this, see the Merchant Shipping (Colonial) Act, 1869 (32 & 33 Vict. c. 11, s. 4), now superseded by the Merchant Shipping Act, 1894, the Colonial Prisoners' Removal Act, 1869 (32 & 33 Vict. c. 10), the Extradition Act, 1870 (33 & 34 Vict. c. 52), the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69, s. 32), and the Colonial Prisoners' Removal Act, 1884 (47 & 48 Vict. c. 31).

Applica-
tion of
Act by
Order in
Council
(Colo-
nies).

. His Majesty the King may, on being satisfied that the legislature of any British possession has [], direct by Order in Council that this Act shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

See Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57, s. 104), Medical Act, 1886 (49 & 50 Vict. c. 48, s. 17), Colonial Probates Act, 1892 (55 & 56 Vict. c. 6, s. 1), Colonial Solicitors Act, 1900 (63 & 64 Vict. c. 14, s. 2); and for the converse, see International Copyright Act, 1886 (49 & 50 Vict. c. 33, s. 9). The object of these enactments is to give effect to arrangements entered into with the Colonies.

For power to substitute a Colonial enactment for the corresponding provision of an Imperial Act see ss. 444, 736 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60); and for power to accept compliance with a requirement of foreign law as equivalent to compliance with a requirement of English law, see s. 445 of the same Act.

. Where it appears to His Majesty in Council that the legislature of part of a British possession has power to make the provision requisite for bringing this Act into operation in that part, it shall be lawful for His Majesty, by Order in Council, to direct that this Act shall apply to that part as if it were a separate British possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

Regard being had to the definition of British possession in s. 18 of the Interpretation Act, 1889, this clause may sometimes be necessary for India, Canada, or Australia. See Colonial Probates Act, 1892 (55 & 56 Vict. c. 6, s. 4). For a slightly different form see Colonial Solicitors Act, 1900 (63 & 64 Vict. c. 14, s. 5). CH. XII.

—(1) Where His Majesty the King has made a convention with a foreign State respecting Application of Act by Order in Council (Foreign Countries).

it shall be lawful for His Majesty in Council to order that this Act shall, and this Act shall accordingly, subject to any conditions, exceptions, and qualifications contained in the Order, apply, during the continuance of the Order, as regards that foreign State.

(2) The Order shall recite or embody the terms of the convention, and may be varied or revoked by Order in Council, but shall not continue in force for any longer period than the convention.

. An Order in Council may, for the purpose of a convention with a foreign State, apply this Act, subject to any exceptions or modifications not inconsistent with the provisions of this Act, to any British possession, and this Act when so applied shall, subject to those exceptions and modifications, and subject as in this section mentioned, have effect as if it were re-enacted with the substitution of that British possession for the United Kingdom. Application of Act to British possessions.

Provided that before it is applied to any British possession named in the Schedule to this Act the Government of that possession shall have adhered to the convention.

See the Mail Ships Act, 1891 (54 & 55 Vict. c. 31). The British possessions scheduled to the Act are the self-governing colonies. See also the Extradition Act, 1870 (33 & 34 Vict. c. 52, ss. 17, 18).

. (A.)—This Act shall [except as in this Act otherwise specially provided] come into operation on the day of Commencement of Act.

When the commencement of an Act is not directed to be from a specific time it comes into operation on the day on which it receives the Royal assent (33 Geo. III. c. 13). The rule before

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1793 was that every Act, not expressing the contrary, was to be deemed to come into operation as from the first day of the session in which it was passed, because by a fiction of law the whole session was considered as one day.

Under s. 36 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), when an Act passed after January 1, 1890, is expressed to come into operation on a particular day, it is to be construed as coming into operation immediately on the expiration of the previous day.

Under the same section, the expression 'commencement,' when used with reference to an Act, is to mean the time at which the Act comes into operation.

As to the exercise of statutory powers during the interval between the passing and the commencement of an Act, see s. 37 of the same Act.

(B.) This Act shall come into force in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day succeeding the proclamation, or on such later day as may be therein specified.

See the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90, s. 3).

(C.) This Act shall come into operation on such day as may be fixed by a notice in that behalf published in the London Gazette.

See the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22, s. 29). For a special commencement clause, see the Army (Annual) Act of each year.

Appointed day.

[Subject as in this Act mentioned] the appointed day for the purposes of this Act shall [in each county] be [*the first day of April* next after the passing thereof, or] such [other] day, [not less [more] than months earlier or later] as the [Local Government Board] may appoint either generally or with reference to any particular provision of this Act, and different days may be appointed for different purposes and different provisions of this Act, whether contained in the same section or in different sections, or for different counties.

See Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 109), Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 84), Local Government

(Ireland) Act, 1898 (61 & 62 Vict. c. 37, s. 124), and London Government Act, 1899 (62 & 63 Vict. c. 14, s. 33). The adoption of some such form as this will often be convenient where different provisions of an Act are to come into operation at different times, and consequently it is not practicable to select any single date for the commencement of the Act.

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. This Act shall continue in force until the *thirty-first* Duration
day of December nineteen hundred and , and no of Act.
 longer.

Where a temporary Act is passed it should usually be made to expire at the end of a calendar year. It will then, if renewal is required, fit easily into the framework of the annual Expiring Laws Continuance Act.

Under Standing Order XLV of the House of Commons, the precise duration of every temporary law must be expressed in a distinct clause at the end of the Bill. See however the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), the duration of which was limited during its passage through the House.

. The Acts mentioned in the schedule to this Repeal of
 Act are hereby repealed to the extent specified in the third enact-
 column of that schedule. ments in
 schedule.

[Provided that—

- (1) This repeal shall not affect the validity of any Order in Council, rule, by-law, warrant, licence, certificate, or document made, granted, or issued, or of any appointment made under any enactment hereby repealed; and
- (2) Any instrument issued under any previous Act and referring to any Act or enactment hereby repealed shall be construed to refer to this Act, or to the corresponding enactment in this Act; and
- (3) Where any enactment hereby repealed extends beyond England and Wales the repeal thereof shall not extend beyond England and Wales.]

It is always desirable to repeal specifically, by a general clause towards the end of the Bill, those enactments which are superseded or virtually repealed by the Bill. As to how far general provisions will operate to repeal specific or local enactments, see *Ashton-under-Lyne Corporation v. Pugh* [1898], 1 Q. B. 45. An enactment should not be included in the schedule of repeals

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unless its repeal is consequential on something in the body of the Bill. If it is proposed to repeal an enactment without putting anything in its place, the repeal should be express and specific in the body of the Bill. If this rule were not observed, every repeal schedule would have to be carefully scrutinized in the House for the purpose of seeing whether some important change of the law was not lurking in its contents. The rule does not apply to Consolidation Bills, the object of which often is to repeal and expurgate obsolete enactments as well as to reproduce living law. But where it is proposed by a Consolidation Bill to treat an enactment as obsolete and repeal it accordingly without reproduction, the reasons for so treating it should be clearly stated in the memorandum or notes accompanying the Bill.

For the ordinary form of a Repeal Schedule see Part II of Appendix I to this chapter.

The ordinary savings by which repealing clauses were formerly qualified are now made unnecessary by s. 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63). More extensive savings will be found in the Statute Law Revision Acts, but these are so wide that they can hardly be treated as precedents. It may, however, sometimes be necessary to prevent the revival of any jurisdiction or other right, and it will more often be useful to save the effect of documents issued, appointments made, &c., under a repealed enactment. And where it is proposed to repeal an enactment under which money has been borrowed, it is desirable to insert an express saving for securities granted or issued and still outstanding. Sub-sections (2) and (3) of the clause above are only appropriate to Consolidation Bills, and the necessity for them must in each case be carefully considered.

Repeal of enactments on rules coming into operation.

. As from the date at which the first rules made under this Act come into operation the enactments specified in the schedule to this Act shall be repealed to the extent mentioned in that schedule.

See 61 & 62 Vict. c. 41, s. 15 (2) (Prison Act, 1898). This is an illustration of a repeal which is to take effect on the coming into force of rules intended to supersede existing statutory provisions. Where this form is used, care must be taken that the rules made supersede all the enactments in the schedule.

Power to repeal or vary Acts in schedule.

. The Acts mentioned in the schedule to this Act may be revoked or varied by His Majesty by Order in Council.

See Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37, s. 17). This is a strong power which would not often be given.



DEFINITIONS.

Explanatory Note.

Most of the definitions in common use before 1889 have now been generalized and superseded by the Interpretation Act, 1889, which is printed as Appendix II to this chapter. Special definitions should be sparingly used, and only for the purpose of avoiding tedious repetitions, or of explaining terms which would be ambiguous without them. A definition is a very dangerous tool to use, especially if it gives a word a non-natural sense, i.e. makes it include something which is not included in its ordinary acceptation. Indeed, a word should never be defined in a non-natural sense. When a horse is defined to include a cow, the meaning really is that the provisions of the Act, or some of them, are to apply to a cow in like manner as they apply to a horse, and this should be so expressed. Nor should a substantive enactment be disguised under the form of a definition. Where the expression defined occurs only in a single section, the definition should, as a rule, be in that section. Definitions of expressions occurring in more than one section should be grouped in a single section.

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It should be made clear whether the definition is intended to be explanatory, restrictive, or extensive. The expression 'shall mean' is explanatory and *prima facie* restrictive. The expression 'shall include' is extensive (see *Corporation of Portsmouth v. Smith*, L. R. 13 Q. B. 184; *Pound v. Plumstead Board of Works*, L. R. 7 Q. B. 194). Therefore the combination 'shall mean and include,' though not uncommon, should be avoided, as it raises a doubt whether the definition is intended to be restrictive or extensive.

Definition sections should, as a rule, be placed towards the end of a Bill. But this rule only applies to what may be called subsidiary definitions. A substantial definition, which defines the scope and subject-matter of a measure should, as a rule, come at the beginning.

An alphabetical list of definitions in public Acts since 1830 has been printed for the Parliamentary Counsel's office. Stroud's Judicial Dictionary contains a useful list of expressions which have been judicially interpreted.

CENTRAL AUTHORITIES.

Preliminary Note.

It is often necessary to specify in an Act the central and local authorities by which it is to be administered.

The principal central authorities in England are—

- (1) The Lord Chancellor (*see* *Interp. Act*, s. 12 (1));
- (2) The Treasury (*see* *Interp. Act*, s. 12 (2));
- (3) The five principal Secretaries of State, Home, Foreign, War, Colonies, and India.

CH. XII. The office of Secretary of State is a unit, though there are five officers. Hence any Secretary of State is capable of performing the functions of the Secretary of State, and consequently it is usual and proper to confer statutory powers in general terms on 'a Secretary of State' or 'the Secretary of State.' (See *Interp. Act*, s. 12 (3).) But in matters relating to India there are certain functions which ought to be exercised by the Secretary of State in Council of India as such (see 21 & 22 *Vict. c. 106*, s. 22, &c.).

- (4) The Admiralty (see *Interp. Act*, s. 12 (4));
- (5) The Privy Council (see *Interp. Act*, s. 12 (5));
- (6) The Board of Education (62 & 63 *Vict. c. 33*, s. 1) superseding the Education Department (see *Interp. Act*, s. 12 (6));
- (7) The Board of Trade (see *Interp. Act*, s. 12 (8));
- (8) The Local Government Board (see 34 & 35 *Vict. c. 70*);
- (9) The Board of Agriculture (see 52 & 53 *Vict. c. 30*);
- (10) The Postmaster-General (see *Interp. Act*, s. 12 (11));
- (11) The Commissioners of Woods (see *Interp. Act*, s. 12 (12));
- (12) The Commissioners of Works (see *Interp. Act*, s. 12 (13));
- (13) The Charity Commissioners (see *Interp. Act*, s. 12 (14));
- (14) The Ecclesiastical Commissioners (see *Interp. Act*, s. 12 (15));
- (15) The National Debt Commissioners (see *Interp. Act*, s. 12 (17)).

It is sometimes necessary to create a new central department, such as the Local Government Board (34 & 35 *Vict. c. 70*), the Board of Agriculture (52 & 53 *Vict. c. 30*), or the Board of Education (62 & 63 *Vict. c. 33*). It is more often necessary to impose additional duties on existing departments, and for that purpose to increase their staff. In each case it may be necessary to make statutory provision as to the duties and staff of the department, and as to their expenses and receipts.

The staff of the department will usually hold during pleasure. It is most unusual to make a new office tenable during good behaviour, unless the duties attached to it are of a judicial character (as to judicial tenure of office see 38 & 39 *Vict. c. 77*, s. 5). The permanent staff will be part of the permanent Civil Service of the Crown, but it will usually be convenient to take a power for employing persons temporarily as well as for making permanent appointments.

By 50 & 51 *Vict. c. 13*, s. 8, the expressions 'permanent civil service of the State, of Her Majesty, and of the Crown,' are explained as being synonymous.

Under s. 17 of the Superannuation Act, 1859 (22 *Vict. c. 26*), a person is not to be deemed, for the purpose of a pension, to have served in the permanent civil service of the State unless he—

- (a) holds his appointment directly from the Crown; or
- (b) has been admitted into the civil service with a certificate from the Civil Service Commissioners.

The number of the staff and their remuneration should be made subject to the control of the Treasury.

The expenses of the department, including the remuneration of the staff, should usually be made payable out of moneys provided by Parliament, i. e. out of the annual votes. To charge such expenses on the Consolidated Fund would withdraw them from the control of Parliament, and this is never done except in the case of judicial officers, or of persons

whom for special reasons it is considered expedient to place in the same position as judicial officers (*see* 54 & 55 Vict. c. 48, s. 28). CH. XII.

The receipts of the department will usually take the form of fees, and will, without express enactment, be subject to the provisions of the Public Offices (Fees) Act, 1879 (42 & 43 Vict. c. 58), which applies (s. 7) to 'all fees, per-centages, and other sums payable in or to any officer of any public office or department the expenses of which are paid wholly or partly out of the Consolidated Fund or moneys provided by Parliament.'

If a new department is created it will be necessary to determine how the department is to be represented in Parliament, and whether the parliamentary representative is to require re-election on appointment (*see* 62 & 63 Vict. c. 33, s. 8).

Forms.

—(1) The [Board of Agriculture] may appoint a secretary and such officers and servants as the [Board] may, with the sanction of the Treasury, determine. Staff and remuneration and expenses.

(2) There shall be paid *out of money provided by Parliament* to the [President], the annual salary of *two thousand pounds* a year, and to the secretary, officers, and servants of the [Board] such salaries or remuneration as the Treasury may determine.

(3) All expenses incurred by the [Board of Agriculture] in the execution of their duties under this Act, to such amount as may be sanctioned by the Treasury, shall be paid *out of money provided by Parliament*.

See 52 & 53 Vict. c. 30, s. 5, and 62 & 63 Vict. c. 33, s. 6.

Words which involve a grant of money, and therefore a special resolution of the House, are always printed in italics. The officers of the House see to this.

—(1) The [Board of Agriculture] may sue and be sued, and may for all purposes be described, by that name. Style and seal of Board.

(2) The Board shall have an official seal which shall be officially and judicially noticed, and that seal shall be authenticated by the signature of the President or some member of the Board, or of the secretary, or some person authorized by the President of the Board to act on behalf of the secretary.

(3) In the execution and discharge of any power or duty transferred to the [Board of Agriculture] by or in pursuance

CH. XII. of this Act, [the Board] shall adopt and use the style and seal of the [Board of Agriculture] and no other.

See 52 & 53 Vict. c. 30, s. 6; 62 & 63 Vict. c. 33, s. 7.

Transfer
of officers.

—(1) There shall be transferred and attached to the [Board of Agriculture] such of the persons employed under the [Privy Council or any other Government department], in or about the execution of the powers and duties transferred by or in pursuance of this Act to the [Board of Agriculture] as the [Privy Council, or Government department], with the sanction of the Treasury, determine.

(2) There shall be transferred and attached to the [Board of Agriculture] all persons employed under the [Land Commissioners for England].

(3) The [Board of Agriculture] may distribute the business of the Board amongst the several persons transferred thereto in pursuance of this Act in such manner as the Board may think right, and those officers shall perform such duties in relation to that business as may be directed by the Board.

Provided that those persons shall, while they continue in office, be in no worse position as respects their tenure of office, salaries, or superannuation allowances, than they would have been in if this Act had not passed.

(4) Any Order in Council made in pursuance of this Act which transfers any powers or duties to the [Board of Agriculture] shall extend this section to the persons employed in or about the execution of those powers and duties.

See 52 & 53 Vict. c. 30, s. 9.

CENTRAL FINANCE.

Preliminary Note.

Ex-
chequer
and Con-
solidated
Fund.

Speaking broadly, and subject to the qualifications mentioned below, all national receipts are paid into the Exchequer, and all national payments are made out of the Exchequer, which is in fact the till into and out of which national payments are made. But in authorizing payments out a distinction is drawn between

payments to be made out of the Consolidated Fund, and payments to be made out of moneys provided by Parliament. The former expression, or an expression to the like effect, is used with reference to payments which require no further authority than that of the statute under which they are made. The latter expression, 'moneys provided by Parliament,' is used with reference to payments which require an annual vote. CH. XII.

The procedure for payments into the Exchequer and payments out of the Consolidated Fund, so far as it depends on statute, is regulated by the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), by the Consolidated Fund Acts and Appropriation Act of each session, and by s. 2 of the Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24), which generalizes and supplements some of the provisions of the annual Appropriation Acts. These enactments regulate what used to be known as 'the course of the Exchequer.' Exchequer and Audit Departments Act, 1866.

Under s. 3 of the Exchequer and Audit Departments Act, 1866, the King is authorized to appoint a Comptroller and Auditor-General and an Assistant Comptroller and Auditor. These officers hold office during good behaviour, subject to removal by the Crown on an address from the two Houses of Parliament. They are not capable of holding their offices together with any other office held during pleasure under the Crown or under any officer appointed by the Crown. They are not capable, while holding their office, of being elected or sitting as members of the House of Commons, and neither of the offices can be held by a peer. Their salaries are fixed by statute and charged on the Consolidated Fund. The intention obviously is to appoint officers who are to be independent both of Parliament and of the Executive Government of the day. Comptroller and Auditor-General.

The double name of the Comptroller and Auditor-General indicates his dual functions. He controls the issues out of the Exchequer by taking care that nothing is issued without due authority. He subsequently audits the authorized expenditure, and satisfies himself that each payment was applied to the purpose to which it was appropriated.

Under s. 10 of the Act the Commissioners of Customs and Inland Revenue and the Postmaster-General are required, after deduction of the payments for drawbacks, bounties of the nature of drawbacks, repayments, and discounts, to cause the gross revenues of their respective departments to be paid in accordance with Treasury regulations to the account of His Majesty's Exchequer at the Banks of England and Ireland respectively. This provision covers the tax revenue proper, and also the postal and telegraph charges fixed by statute. The same section directs in general terms that all other public moneys payable to the Exchequer are to be paid to the same account. Accounts of all these payments are to be rendered to the Comptroller and Auditor-General daily in a form prescribed by the Treasury. Payments into Exchequer.

CH. XII.

Consolidated Fund.

Under s. 11 of the Act all moneys paid into the Bank of England and the Bank of Ireland on account of the Exchequer are to be considered as forming one general fund in the books of the Banks, and all orders directed by the Treasury to the Banks for issues out of the credits to be granted by the Comptroller and Auditor-General for the public service are to be satisfied out of this general fund.

The Consolidated Fund was established by Pitt's Act of 1787 (27 Geo. III. c. 13). Before that date every separate head of receipt and the produce of every particular tax was specially appropriated by law to the discharge of a particular head of expenditure. But a similar consolidation had been previously effected of special funds appropriated to special debts.

Under s. 12 of the Act of 1866 quarterly accounts of the income and charge of the Consolidated Fund are to be prepared, and if it appears from any such account that there is a deficiency in the Consolidated Fund, that is to say, that the balances at the close of a quarter are insufficient to meet the charges accruing up to the fifth day of the following month, being the date on which the interest on the National Debt is payable, the Comptroller and Auditor-General is to certify the amount to the Bank of England or Ireland, who are thereupon authorized to make advances, which are to be repaid with interest out of the growing produce of the Consolidated Fund in the next succeeding quarter.

Consolidated Fund charges and annual supply charges.

The public expenditure is, as already explained, divided into two separate and distinct general heads, known respectively as the Consolidated Fund charges and the annual supply charges. The first head includes the more permanent charges which have been authorized by Parliament to be paid from time to time when due, the Treasury being responsible for the mode and date of payment. The second head comprises the charges annually granted by Parliament, and thus brought periodically under its immediate cognizance and control. Payments falling under the first head are described in statutory language as being made out of the Consolidated Fund. Payments falling under the second head are described as being made out of moneys provided by Parliament.

Consolidated Fund charges. Charge for public debt.

The Consolidated Fund charges include the annual charges for the public debt, the Civil List, judicial salaries, and other payments of a fixed and permanent character.

The first Consolidated Fund charge is the permanent annual charge for the public debt.

The public debt may be classified under four heads:—

- I. The permanent funded debt;
- II. The funded debt of terminable annuities;
- III. The temporary war loan of 1900; and
- IV. The unfunded or floating debt.

Heads of public debt.

Permanent

I. The permanent funded debt includes the several Government Stocks of permanent annuities, which are at present—

The $2\frac{1}{2}$ per cent. Consolidated Stock (1903) created under the National Debt (Conversion) Act, 1888 (51 & 52 Vict. c. 2), and the National Debt Redemption Act, 1889 (52 & 53 Vict. c. 4, s. 5); Ch. XII.
—
funded
debt.

The $2\frac{1}{2}$ per cent. Annuities (1905) created under the National Debt (Conversion of Stock) Act, 1884 (47 & 48 Vict. c. 23);

The $2\frac{1}{2}$ per cent. Annuities created under the last-mentioned Act;

The Local Loans 3 per cent. stock created under the National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16, s. 6); and

The guaranteed land stock created under the Purchase of Land (Ireland) Act, 1891 (54 & 55 Vict. c. 48, s. 1).

This head of debt also includes the debt to the Banks of England and Ireland, as to which see s. 5 of the Bank Act, 1892 (55 & 56 Vict. c. 48), and the charge in favour of the National Debt Commissioners created by the National Debt (Conversion of Bonds) Act, 1892 (55 & 56 Vict. c. 26).

II. The terminable annuity debt consists of annuities granted either for life or for a fixed number of years, the repayment of the principal debt being comprised in the annuity. The payments on account of the capital of terminable annuities were suspended for a year by the Finance Act, 1900 (63 & 64 Vict. c. 7, s. 17). Funded
debt of
termin-
able
annuities.

III. The special War Loan authorized to be raised under the War Loan Acts of 1900 (63 & 64 Vict. cc. 2, 61), was raised in part by a new capital stock called War Stock and by the issue of bonds called War Bonds, each bearing interest at the rate of $2\frac{1}{2}$ per cent. per annum, and each to be redeemed on April 5, 1910. War
Loan.

IV. The floating or unfunded debt consists of short loans which are usually raised by the issue of Exchequer bonds, Exchequer bills, or Treasury bills.

The issue of Exchequer bills and Exchequer bonds is regulated by the Exchequer Bills and Bonds Act, 1866 (29 & 30 Vict. c. 25), as amended by 40 & 41 Vict. c. 2, and 52 & 53 Vict. c. 6, s. 5. Floating
or un-
funded
debt.

Exchequer bills are prepared and made out at the Bank of England in such method and form, with coupons for interest for such term not exceeding five years from their date, and under such regulations as the Treasury think most safe and convenient (29 & 30 Vict. c. 25, s. 3). The authority for their issue from the Bank is a Treasury warrant countersigned by the Comptroller and Auditor-General (s. 6). The principal of the debt which they represent and the interest thereon is charged on and payable out of the Consolidated Fund or the growing produce thereof (s. 7). Exchequer bills have practically fallen into disuse. Ex-
chequer
bills and
Ex-
chequer
bonds.

Most of the provisions applying to Exchequer bills are applied also to Exchequer bonds by 29 & 30 Vict. c. 25, s. 6, but the principal and interest of Exchequer bonds are not charged on the Consolidated Fund except under a special direction (see e.g. 63 & 64 Vict. c. 2, s. 3, c. 61, s. 1).

CH. XII.
—
Treasury
bills.

Treasury bills are regulated by the Treasury Bills Act, 1887 (40 & 41 Vict. c. 2). A Treasury bill is to be in the form prescribed by Treasury regulations, and is to be a bill for the payment of the principal sum named therein in the manner and at the date therein mentioned, so that the date be not more than twelve months from the date of the bill. Interest is to be payable in respect of a Treasury bill at such rate and in such manner as the Treasury direct (s. 4). Treasury bills are to be issued by the Bank of England under the authority of a warrant from the Treasury countersigned by the Comptroller and Auditor-General (s. 8). All money raised by the issue of a Treasury bill is to be paid into the Exchequer. The principal money of and interest on any Treasury bill is to be charged on and payable out of the Consolidated Fund or the growing produce thereof (s. 5).

Under s. 6 the Treasury may issue Exchequer bills or Treasury bills in lieu of bills paid off during the same financial year.

The money raised by these bills and bonds is borrowed from the Bank of England, the National Debt Commissioners, and other persons willing to lend (52 & 53 Vict. c. 4, s. 6).

For an instance of a power to borrow by means of Treasury Bills, *see* the Treasury Bills Act, 1899, Session 2.

The Bank of England are by their Acts and charters prohibited from lending to the Government unless authorized to do so, and therefore a special authority must in some cases be given. It is always given by the Consolidated Fund Acts of each session. They have a general authority to lend on the security of Exchequer bills or bonds (29 & 30 Vict. c. 25, s. 30), and of Treasury bills (40 & 41 Vict. c. 2, s. 13). But loans of this kind are now obsolete, being replaced by the deficiency advances referred to above, and by the Ways and Means advances referred to below.

The National Debt Commissioners also require special authority to lend out of the funds which they hold on account of the Post Office and other savings banks. They will not lend except on a guarantee from the Consolidated Fund, which however may be only a secondary security (*see* 52 & 53 Vict. c. 71, s. 8; 54 & 55 Vict. c. 24, s. 4 (3)).

The National Debt is managed by the Banks of England and Ireland, and the annual charge for its management is now regulated by s. 4 of the Bank Act, 1892 (55 & 56 Vict. c. 48).

The payments on account of the interest and principal of the National Debt are now regulated by Sir Stafford Northcote's Sinking Fund Act of 1875 (38 & 39 Vict. c. 45), as amended by the National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16).

Under s. 4 of the Act of 1875 the Treasury are required to prepare within fifteen days after the expiration of every financial year an account of the public income and expenditure of the United Kingdom, showing the surplus of income or the excess of expenditure during that year. If it appears from the account for any financial year that there is a surplus of income above expenditure

Charge
for man-
agement
of Na-
tional
Debt.
Sinking
Fund Act,
1875.
Old Sink-
ing Fund.

for that year, the Treasury are required in the course of the next financial year to cause the amount of this surplus to be issued out of the Consolidated Fund or the growing produce thereof to the National Debt Commissioners, to be applied by them in purchasing, redeeming, or paying off the National Debt. The amount of this surplus is called the Old Sinking Fund. It was made applicable in 1897 to the expenses of certain military works (60 & 61 Vict. c. 7, s. 3), and in 1898 to the provision of certain public buildings (61 & 62 Vict. c. 5).

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Section 1 of the Act of 1875 directs that a specified annual sum, described as the permanent annual charge for the National Debt, is to be charged on and issued out of the Consolidated Fund at such times and in such manner as may be required for paying the charges payable thereout, and subject thereto as the Treasury may from time to time direct, so that the whole amount thereof be issued in each financial year. The amount of the permanent annual charge was fixed by the Act of 1875 at £28,000,000, was increased to £28,800,000 in 1880, but has been since reduced by Acts of 1887 (50 & 51 Vict. c. 16, s. 2), 1889 (52 & 53 Vict. c. 6, s. 1), and 1899 (62 & 63 Vict. c. 9, s. 16) to £23,000,000.

Perma-
nent
annual
charge
for the
National
Debt.

Under s. 2 of the National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), which superseded s. 2 of the Sinking Fund Act, 1875, there are to be payable as part of the permanent annual charge for the National Debt:—

- (a) all such perpetual and terminable annuities, and the interest on all such exchequer bonds and other debts as are specified in Part I of the First Schedule to the Act; and
- (b) all interest on advances made by the Bank of England or the Bank of Ireland in pursuance of s. 12 of the Exchequer and Audit Departments Act, 1866; and
- (c) the interest on all loans borrowed under any Act on account of ways and means; and
- (d) the annual amounts payable for the time being to the Bank of England and Bank of Ireland for the management of, or expenses connected with, the National Debt, or any part thereof.

But there are not to be payable as part of the permanent charge of the National Debt—

- (a) the deferred annuities, or the interest on the Exchequer bonds, specified in Part II of the First Schedule to the Act; or
- (b) any annuities or the interest on any Exchequer bonds, Exchequer bills, Treasury bills, or other loans, created, issued, or borrowed under any Act passed after the passing of the Act of 1887, which does not direct the same to be payable as part of the permanent annual charge.

Where, therefore, the interest on any debt is to be paid

CH. XII. — out of the permanent annual charge there is a specific enactment to this effect. Thus the dividends on the new consols created since 1875 are expressly required to be paid out of the permanent annual charge (*see* 47 & 48 Vict. c. 23, s. 1; 51 & 52 Vict. c. 2, s. 2 (5). *See also* 40 & 41 Vict. c. 2, s. 12 (Treasury Bills), and 55 & 56 Vict. c. 26, s. 1 (Conversion of Exchequer Bonds)). But the principal and interest and other sums charged in respect of the War Loan of 1900 are not to be payable as part of the permanent annual charge (63 & 64 Vict. c. 2, s. 3).

New
Sinking
Fund.

Under s. 3 of the Sinking Fund Act, 1875 (as amended by 40 & 41 Vict. c. 2, s. 7), such portion of the permanent annual charge as is in any financial year not required for the purpose of paying the annual charges directed by the Act to be paid thereout, is to be issued by the National Debt Commissioners and applied by them in redemption of annuities, perpetual or terminable, charged on the Consolidated Fund and Exchequer bonds and Treasury and Exchequer bills, but is not to be applied in paying off any advances made by the Banks of England or of Ireland in pursuance of s. 12 of the Exchequer and Audit Act, 1866, or in paying off any loan borrowed under any Act to meet ways and means. This surplus over the permanent annual charge is described as the New Sinking Fund. Its payment has been more than once suspended, e. g. by the Finance Act, 1900 (63 & 64 Vict. c. 7, s. 16).

Under ss. 7 and 8 of the Act of 1875 accounts of the Old and New Sinking Funds are to be kept and published.

Supply of
money
for Con-
solidated
Fund
charges.

The mode of supplying money to meet Consolidated Fund charges is regulated by s. 13 of the Exchequer and Audit Departments Act, 1866. Under that section the Comptroller and Auditor-General is to grant to the Treasury on their requisitions authorizing the same, if satisfied of the correctness thereof, credits on the Exchequer accounts at the Banks of England or Ireland, or on the growing balances thereof, not exceeding the amount of the charge in the quarterly account of the income and charge of the Consolidated Fund remaining unpaid. The Comptroller and Auditor-General is also to grant from time to time to the Treasury on similar requisitions supplemental credits for services payable under any Act out of the growing produce of the Consolidated Fund and not included in the quarterly account.

The issues or transfers of moneys required from time to time by the various principal accountants to enable them to make the payments entrusted to them are to be made out of these credits on orders issued to the Banks signed by a Secretary to the Treasury, or in his absence by an officer appointed by the Treasury for the purpose, and each of these orders is to set forth the service for which the issue is authorized.

A daily account of all issues or transfers made from the Exchequer accounts in pursuance of these orders is to be transmitted by the Banks to the Comptroller and Auditor-General.

The payment of money required to meet Supply charges is authorized by resolutions in the Committee of Supply and in the Committee of Ways and Means. CH. XII.
—

‘The Committee of Supply controls the public expenditure by considering the grants of money that will be required for the army, navy, and civil services of the current year, upon the estimates of that expenditure prepared by the Ministers of the Crown. The Committee of Ways and Means provides the public income raised by the imposition of annual taxation, and votes the resolutions that authorize the issue out of the Consolidated Fund of the sums required to meet the grants voted by the Committee of Supply’¹. Procedure for authorizing expenditure of money required to meet Supply charges.

A resolution of the Committee of Supply, when reported and agreed to by the House, sanctions the expenditure described in the resolution. The form of a resolution in supply is: ‘Resolved that a sum not exceeding be granted to His Majesty [to complete the sum necessary] to defray the charge which will come in course of payment during the year ending on the 31st day of March 19 for .’ The words in brackets are inserted if a sum has already been voted on account. Resolution in Committee of Supply.

But the expenditure authorized by a resolution of the Committee of Supply cannot proceed until money has been provided to meet it, and this is done by a resolution in Committee of Ways and Means, which may not propose an amount in excess of the expenditure voted in supply. The form of a resolution in the Committee of Ways and Means is: ‘Resolved that towards making good the supply granted to His Majesty for the service of the year ending the 31st day of March 19 , the sum of be granted out of the Consolidated Fund of the United Kingdom.’ Resolution in Committee of Ways and Means.

This resolution having been passed, reported to the House, and agreed to, the next step is to get the money out of the Consolidated Fund, which can only be done by an Act of Parliament, and is in practice done by Acts called Consolidated Fund Acts, as supplemented by the annual Appropriation Act. Consolidated Fund Acts.

Several Consolidated Fund Acts (preceded by the Ways and Means resolutions) are generally required in the course of a session to provide for the Votes in Supply as they gradually pass the Committee. Each Act authorizes the Bank to advance on the application of the Treasury, to the amount covered by the Act, the sums required for the public service in respect of any services voted in the same session. These advances are called Ways and Means advances.

As soon as the Ways and Means have thus been provided by Parliament, the next step is to obtain from the Comptroller and Issue of credit by

¹ *May's Parliamentary Practice*, tenth edition, p. 554.

² The financial year has ended with the 31st of March since 1854 (see 17 & 18 Vict. c. 94, s. 2).

Ск. XII. Auditor-General a credit for the amount required to be issued under s. 15 of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39). This section runs as follows:—

Comptroller and Auditor-General.

‘When any ways and means shall have been granted by Parliament to make good the supplies granted to Her Majesty by any Act of Parliament or resolution of the House of Commons, the Comptroller and Auditor-General shall grant to the Treasury, on their requisition authorizing the same, a credit or credits on the Exchequer accounts at the Bank of England and Bank of Ireland, or on the growing balances thereof, not exceeding in the whole the amount of the ways and means so granted. Out of the credits so granted to the Treasury issues shall be made to principal accountants from time to time on orders issued to the said Banks, signed by one of the secretaries of the Treasury, or in their absence by such officer or officers as the Treasury may from time to time appoint to that duty; and the services or votes on account of which the issues may be authorized shall be set forth in such orders: Provided always, that the issues for Army and Navy services shall be made under the general heads of “Army” and “Navy” respectively.

‘A daily account of all issues made from the Exchequer accounts in pursuance of such orders shall be transmitted by the said Banks to the Comptroller and Auditor-General.’

Issue by Treasury.

To make supply available the royal signature is required to an order authorizing the Treasury to make the necessary issues out of the credits granted. This is regulated by s. 14 of the Exchequer and Audit Departments Act, 1866, which is as follows:—

‘When any sum or sums of money shall have been granted to Her Majesty by a resolution of the House of Commons, or by an Act of Parliament, to defray expenses for any specified public services, it shall be lawful for Her Majesty from time to time, by her Royal Order under the Royal Sign Manual, countersigned by the Treasury, to authorize and require the Treasury to issue, out of the credits to be granted to them on the Exchequer accounts as hereinafter provided, the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted.’

Appropriation Act.

When all the supply of the session has been voted, an Appropriation Act is passed providing the balance of ways and means required for the session, and appropriating in detail the various sums voted out of the Consolidated Fund to the different purposes specified in the resolutions passed in Committee of Supply as agreed to by the House. The Act includes all the supply voted in the session for the service of whatever year may be intended.

Each of the annual Appropriation Acts supplements the Consolidated Fund Acts by authorizing the Treasury to issue out of the Consolidated Fund the balance of the supply grants and

apply it towards making good the supply granted for the service of the specified financial year, and to borrow by means of Ways and Means advances on the credit of this balance any sum or sums of equal or less amount in the whole. The money so borrowed is to be repaid by the Treasury with interest not exceeding 5 per cent. per annum out of the growing produce of the Consolidated Fund at any period not later than the next succeeding quarter to that in which the money was borrowed. Any money so borrowed is to be placed to the credit of the Exchequer, and to form part of the Consolidated Fund, and be available in any manner in which that fund is available.

The Act then goes on to appropriate the grants of the year by declaring that all sums granted by the Appropriation Act and by the other Consolidated Fund Acts of the year (which are specified in a schedule to the Act) out of the Consolidated Fund towards making good the supply granted to His Majesty, amounting in the aggregate to the sum appearing by that schedule, are appropriated and to be deemed to be appropriated as from the date of the passing of the first of the Consolidated Fund Acts for the purposes and services expressed in another schedule.

By s. 2 of the Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24), which is a permanent enactment supplementing the Annual Appropriation Acts, it is declared that where an Act authorizes any sum to be issued out of the Consolidated Fund towards making good the supply granted for the service of any year, every sum issued in pursuance of that Act is to be applied towards making good the supply so granted at the time of the issue.

Payments out of the Exchequer are made through the Paymaster-General. The office of Paymaster-General still exists, but no salary is attached to it, and by an Act of 1889 (52 & 53 Vict. c. 53), power was given to transfer its functions to the Banks of England and Ireland. This power has not been exercised.

The system is so worked that at the end of each financial year the unexpended balances on any appropriation account are repayable to the Exchequer, and go either in relief of the expenditure of a subsequent year or to swell the Old Sinking Fund.

The departments entrusted with the expenditure of public money render appropriation accounts to the Comptroller and Auditor-General. He examines the accounts and reports upon them to the House of Commons in the February of each year. The House then refers his reports to the Public Accounts Committee—a committee appointed under a Standing Order—which examines them and calls attention to any want of correspondence between votes and payments or other irregularity which may appear from the reports.

Among the leading characteristics of the system above described are—

Paymaster-General.

Audit and reference to Public Accounts Committee.

General character-

CH. XII.

(1) Payment of all receipts and expenditure into and out of one general account; and

istics of
system.

(2) Annual surrender of unexpended balances.

But the simplicity of this system has been affected by the practice of appropriations in aid and by the creation under recent Acts of special accounts.

Appro-
priations
in aid.

By s. 2 of the Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24), which sanctioned a practice previously in existence, all money directed by or in pursuance of any Act, or by the Treasury, to be applied as an *appropriation in aid* of money provided by Parliament for any purpose is to be deemed money provided by Parliament for that purpose, and is, *without being paid into the Exchequer*, to be applied, audited, and dealt with accordingly, and so far as it is not in fact so applied is to be paid into the Exchequer. Schedule B to the Appropriation Act now shows appropriations in aid in a separate column.

Under the same section, where any fee, penalty, proceeds of sale, or other money of the nature of an *extra receipt*, is by virtue of any Act or otherwise payable into the Exchequer, the Treasury may, by a minute to be laid before Parliament, direct that the whole or any specified part thereof shall be applied as an appropriation in aid of money provided by Parliament for the service mentioned in the minute.

Appropriations in aid may therefore be applied for purposes of authorized public expenditure without being passed through the national till. For an example of an enactment expressly authorizing an appropriation in aid, *see* 46 & 47 Vict. c. 52, s. 77.

Special
accounts.

The most important of the special accounts is the Local Taxation Account created under the Local Government Act, 1888 (51 & 52 Vict. c. 41).

Local
taxation
account.

Under ss. 20 & 21 of the Local Government Act, 1888, the Commissioners of Inland Revenue are required to pay into the Bank of England to a special account called the Local Taxation Account, instead of to the general account of the Exchequer, the proceeds of the duties collected by the Commissioners in the several administrative counties of England and Wales on certain licences referred to in the Act as local taxation licences, and to pay into the same account a proportion of the proceeds of the sums collected by them in respect of the probate duties. The sums paid into this account are paid over to county councils.

Under s. 27 of the same Act the accounts of the receipts and expenditure of the Local Taxation Account are to be audited as a public account by the Comptroller and Auditor-General, and if in any financial year the moneys standing to the Local Taxation Account are insufficient to meet the payments which ought, in the opinion of the Local Government Board, to be made out of it, that Board may borrow temporarily, on the security of the account, such sums as may be required for meeting the deficiency.

Similar Local Taxation Accounts are created for Scotland and Ireland, under the Probate Duties (Scotland and Ireland) Act, 1888 (51 & 52 Vict. c. 60), amended as to Ireland by the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37, ss. 48, 58). See also as to the Local Taxation Account for Scotland, ss. 19-24 of the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50).

CH. XII.

S. 19 of the Finance Act, 1894 (57 & 58 Vict. c. 30), substituted a share of the estate duty for a corresponding share of the probate duties.

Under s. 7 of the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), certain duties in respect of spirits and beer, called the Local Taxation (Customs and Excise) duties, are to be carried to the several local taxation accounts, and their application is regulated by a later Act of the same session, the Local Taxation (Customs and Excise) Act, 1890 (53 & 54 Vict. c. 60), and by the Police Act, 1890, and the Technical Instruction Act, 1891.

Under s. 15 of the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), which supersedes provisions previously contained in 53 & 54 Vict. c. 14, 55 & 56 Vict. c. 47, and 56 & 57 Vict. c. 43, a separate account, called the Cattle Pleuro-Pneumonia Account of Great Britain, is required to be kept at the Bank of England, and there are to be paid to this account—

Cattle
Pleuro-
Pneu-
monia
Account
for Great
Britain.

(a) Such moneys not exceeding 140,000*l.* in any one year, as may be provided by Parliament towards defraying the costs incurred by the Board of Agriculture in the execution in Great Britain of the provisions relating to the slaughter of cattle, animals, or swine on account of pleuro-pneumonia, foot-and-mouth disease, or swine fever; and

(b) All sums received by the Board of Agriculture on the sale of the carcasses of cattle, animals, or swine slaughtered under those provisions after deducting any amounts payable to the owners.

If in any financial year the money standing to the account is insufficient to defray the expenses of the execution of those provisions in Great Britain, the Local Government Board and the Secretary for Scotland are required to pay out of the Local Taxation Account and the Local Taxation (Scotland) Account respectively, to the Cattle Pleuro-Pneumonia Account for Great Britain, in the proportions provided by the Act, such additional sums as may be certified by the Board of Agriculture for defraying those expenses.

There are separate provisions as to Ireland in s. 73.

Until recently the Mercantile Marine Fund constituted another special fund of great importance, which included many items of receipt and expenditure connected with merchant shipping. But, under the Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44), this has now been superseded by the

General
Light-
house
Fund.

CH. XII. General Lighthouse Fund, which includes only receipts and expenses specially relating to lighthouses, buoys, and beacons.

Naval Defence Account. Another special account, but of a temporary character, was created under the Naval Defence Act, 1889 (52 & 53 Vict. c. 8), but was closed by the Finance Act, 1894 (57 & 58 Vict. c. 30, s. 41).

Loans from public money. In preceding paragraphs the State has been considered in its borrowing capacity. But the State also lends money from public funds for the purpose of works of public improvement. Its proceedings in this capacity are regulated mainly by the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), the Public Works Loans (Ireland) Act, 1877 (40 & 41 Vict. c. 27), and the National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16).

Loans by Public Works Loan Commissioners. The Public Works Loans Act, 1875, establishes a body of Commissioners, styled the Public Works Loan Commissioners, whose functions are to supervise loans from public money for public purposes.

S. 9 gives a general authority to the Commissioners to make loans for the purpose of any works mentioned in the First Schedule to the Act (as extended by 59 & 60 Vict. c. 42, s. 2) to any person having power under an Act of Parliament or otherwise to borrow for such a purpose. In considering the propriety of granting a loan, the Commissioners are to have regard to the sufficiency of the security for its repayment, and, subject to the provisions of any special Act, are to determine whether the work for which the loan is asked would be such a benefit to the public as to justify a loan out of the public money, having regard to the amount of money placed at their disposal by Parliament.

Interest on loans. Every loan granted under the Act is to bear interest at a rate not less than the rate authorized by the Act, or, if no rate is so authorized, not less than 5 per cent. per annum. This minimum rate was by 55 & 56 Vict. c. 61, s. 2, reduced to 4 per cent. as to loans granted after the passing of that enactment, and has been further reduced by the Public Works Loans Act, 1897 (60 & 61 Vict. c. 51, s. 1).

S. 2 of the Public Works Loans Act, 1879 (42 & 43 Vict. c. 77), directs that where a loan is granted by the Public Works Loan Commissioners or by the Commissioners of Public Works in Ireland, and the rate of interest for the loan, fixed by the special Act which authorizes the Commissioners to grant the loan, is a special rate not less than 5 per cent. (as to loans since June 28, 1892, 4 per cent., 55 & 56 Vict. c. 61, s. 2), the loan shall, notwithstanding anything in the special Act, bear interest at a rate not less than the rate in the special Act, and such other rate as may be necessary in the judgement of the Treasury, in order to enable the loans to be made without loss to the Exchequer.

S. 1 of the Public Works Loans Act, 1897 (60 & 61 Vict. c. 51), enacts that 'The rates of interest at which loans may be

made out of the Local Loans Fund on the security of local rates may be fixed by the Treasury from time to time, having regard to the duration of the loan, and shall be such rates not less than two and three-quarters per cent. per annum as in the opinion of the Treasury are sufficient to enable such loans to be made without loss to the Local Loans Fund.' By s. 11 of the same Act the same provision is applied to certain loans under the Military Lands Act, 1892 and 1897, and s. 663 of the Merchant Shipping Act, 1894. The Act of 1897 repealed several enactments fixing special rates of interest on loans under previous Acts. CH. XII.

S. 11 of the Public Works Loans Act, 1875, as amended by s. 5 of the Public Works Loans Act, 1898 (61 & 62 Vict. c. 54), directs that every loan granted under the Act is to be made repayable by instalments in the form of an annuity or otherwise within a period from the date of the actual advance of the loan, not exceeding the period authorized by the special Act relating to the loan, or, if no period is so authorized, not exceeding thirty years. The same section gives power to extend the period for repayment under special circumstances. Terms for repayment.

The Commissioners before advancing money are to take security for repayment of the loan with interest. The security is to be that authorized by the special Act relating to the loan, or, if none is so authorized, of a mortgage of property or a rate, or of both property and a rate, and of personal security, unless the Commissioners think personal security can be dispensed with. Security for loan.

Under s. 18, where a loan is granted by the Commissioners on the security of a mortgage of any property, whether with or without any other security, the property is to be charged with payment to the use of the Crown of the loan with interest as mentioned in the mortgage in priority, save so far as otherwise specified, over every other debt, mortgage, or charge, except any loan due to any creditor not assenting to such priority which has been advanced in good faith before the loan advanced by the Commissioners and secured by a mortgage of the property executed to a person who is entitled as a bona fide creditor to the repayment thereof with interest.

Powers for realizing their security are given to the Commissioners by other provisions of the Act of 1875.

Under the Public Works Loans (Ireland) Act, 1877 (40 & 41 Vict. c. 27), the Commissioners of Public Works in Ireland have, for the purpose of loans in Ireland, powers similar to those exercisable by the Public Works Loan Commissioners for loans in Great Britain.

The National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), constituted a Local Loans Fund, under the control of the National Debt Commissioners, out of which those Commissioners advance money for the purpose of loans by the Public Works Loan Commissioners, the Fishery Board for Scotland, the Commissioners of Public Works in Ireland, or by the Irish Land Local Loans Fund.

CH. XII. Commissioners, or for the purpose of similar loans by the Treasury (ss. 6, 7) (all which loans are in the Act called local loans). The same Act, by s. 8, authorized the creation of a special class of stock, called local loans stock, for the purpose of advances in accordance with the Act. The rate of interest on, and date of redemption of, the stock may now be fixed by the Treasury under the Public Works Loans Act, 1897 (60 & 61 Vict. c. 51, s. 2).

S. 11 of the Act of 1887 directed that an annual sum of 130,000*l.* should be paid out of the Local Loans Fund and carried to a separate fund, called the Restitution Fund, to be applied towards restitution of losses to the Exchequer through the non-payment of local loans, but this annual payment was abolished by the Public Works Loans Act, 1897, which made new provisions as to the application of any surplus on the income account of the Local Loans Fund (60 & 61 Vict. c. 51, s. 4).

S. 15 of the Act of 1887, as amended by the Act of 1897, directs that where the whole or any part of the principal of any local loan is, by reason of the same not being likely to be recovered, directed by Parliament to be written off from the account of assets of the Local Loans Fund, the amount of the principal is to be treated as a loss to the Exchequer; but it is declared that nothing in the section is to alter the liability of any person or body corporate to pay the principal or interest of any local loan or any part thereof. Any amount so directed to be written off is to be paid to the National Debt Commissioners out of moneys provided by Parliament, and any sum afterwards recovered, whether for principal or interest, in respect of the amount so written off is to be paid into the Exchequer.

The provisions of the National Debt and Local Loans Act, 1887, have been applied to certain colonial loans by the Colonial Loans Act, 1899 (62 & 63 Vict. c. 36).

Annual
Public
Works
Loans
Acts.

A Public Works Loans Act is passed in each year for authorizing the National Debt Commissioners to issue, in accordance with the National Debt and Local Loans Act, 1887, such sums as may be required for the purpose of loans by the Public Works Loan Commissioners, the Commissioners of Public Works in Ireland, or the Fishery Board for Scotland, or of similar local loans. These Acts often contain provisions for writing off bad debts from the account of assets of the Local Loans Fund in accordance with s. 15 of the Act of 1887, or for cancelling such debts altogether (*see, e.g.,* 53 & 54 Vict. c. 50, ss. 3, 4; 59 & 60 Vict. c. 42, ss. 4, 5; 60 & 61 Vict. c. 51, ss. 7, 9; 61 & 62 Vict. c. 54, s. 2; 62 & 63 Vict. c. 31, s. 2).

By the Light Railways Act, 1896 (59 & 60 Vict. c. 48, ss. 4, 5, 6), the Treasury were empowered to grant loans and make special advances for the purposes of light railways without the intervention of the Public Works Loan Commissioners, and to

borrow money for the purpose from the National Debt Commissioners. Loans are also granted to the Congested District Commissioners for Scotland and the Congested District Board for Ireland. CH. XII.

Forms.

For power to borrow for a term of ten years, but without any provision for repayment, *see* the War Loan Acts of 1900 (63 & 64 Vict. cc. 2, 61). For power to borrow by terminable annuities, *see* the Telegraph Act, 1892 (55 & 56 Vict. c. 59, s. 1). For power to advance for special purposes mentioned in a schedule, *see* the Naval Works Act, 1896 (59 & 60 Vict. c. 6), the Military Works Act, 1897 (60 & 61 Vict. c. 7), and the Public Buildings Expenses Act, 1898 (61 & 62 Vict. c. 5). *See also* the Uganda Railway Act, 1896 (59 & 60 Vict. c. 38), and the Royal Niger Company Act, 1899 (62 & 63 Vict. c. 43, s. 2).

For power to convert funded debt into terminable annuities *see* the Finance Act, 1899 (62 & 63 Vict. c. 9, s. 17).

For power to lend to a colony, *see* the British Columbia (Loan) Act, 1892 (55 & 56 Vict. c. 52). In this case the advance was made by the Treasury. Under the Harbour of Colombo Loan Act, 1874 (37 & 38 Vict. c. 24), the advance was made by the Public Works Loan Commissioners. The Colonial Loans Act, 1899 (62 & 63 Vict. c. 36) authorized the Treasury to lend money to sundry Colonial Governments, and declared that these loans were to be local loans within the meaning of the National Debt and Local Loans Act, 1887. In all these cases careful provisions were made for the protection of the lender, including a provision that the validity of the charge on the colonial revenues was not to be impaired by any colonial law.

For other borrowing powers, *see* Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24, s. 4), Russian Dutch Loan Act, 1891 (54 & 55 Vict. c. 26).

For power to guarantee a loan by a charge on the Consolidated Fund *see* the Mauritius Hurricane Loan Act, 1892 (55 & 56 Vict. c. 49), s. 6 of the Public Works Loans Act, 1882 (45 & 46 Vict. c. 62), and the Greek Loan Act, 1898 (61 & 62 Vict. c. 4).

—(1) The Public Works Loan Commissioners may in manner provided by the Public Works Loans Act, 1875, lend any money which may be borrowed by a [local authority] for the purposes of this Act. Power for Public Works Loan Commissioners to lend.

(2) Every loan by the Public Works Loan Commissioners under this Act [shall be repaid within a period not exceeding fifty years and] shall bear such rate of interest, not less than per cent. per annum, as the Treasury may authorize as 38 & 39 Vict. c. 89.

CH. XII. being in their opinion sufficient to enable the loan to be made without loss to the Local Loans Fund.

See 55 & 56 Vict. c. 31, s. 19, and 53 & 54 Vict. c. 70, s. 83. If the loan is on the security of local rates or for the purposes mentioned in s. 11 of the Public Works Loans Act, 1897 (60 & 61 Vict. c. 51), a reference to the rate of interest is made unnecessary by s. 1 of that Act.

Money to be applied as appropriation in aid.

. The amount of the [purchase money and costs] shall be defrayed as part of the expenses of the [Land Commission], and all sums received by the [Land Commission] in respect of [bogs] purchased in pursuance of this section shall, if directed by the Treasury, be applied as an appropriation in aid of money provided by Parliament for the expenses of the [Land Commission], and, so far as not so directed, shall be paid into the Exchequer.

See 54 & 55 Vict. c. 45, s. 1.

LOCAL AUTHORITIES AND LOCAL FINANCE.

Preliminary Note.

Under the system established by the Local Government Acts of 1888 and 1894 (51 & 52 Vict. c. 41, 56 & 57 Vict. c. 73), the principal local authorities in England are county councils, district councils, and parish councils, to which must be added councils of county boroughs, as occupying a somewhat anomalous position.

District councils are either urban or rural.

Urban district councils are either borough councils (other than the councils of county boroughs) or the successors of local boards or improvement commissioners, and thus, together with county boroughs, correspond to, and take the place of, the urban sanitary authorities under the Public Health Act, 1875.

All boroughs outside London, whether county boroughs or not, are governed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), but the council of a county borough is, for the purposes of the Local Government Acts of 1888 & 1894, co-ordinated with, and not subordinated to, the council of the county in which it is geographically situate (see the definitions of 'county' and 'county council' in s. 75 of the Act of 1894). The council of a county borough (as to which *see* ss. 31 and following of Local Government Act, 1888) is not a district council, and its district is not a county district within the meaning of s. 21 of the Local Government Act, 1894 (*see* s. 35 of that Act).

Consequently it is usually necessary to determine expressly in each,

case whether county boroughs are to be co-ordinated with county councils or with district councils. Ch. XII.

Rural district councils take the place of the rural sanitary authorities under the Public Health Act, 1875 (*see* ss. 21 and 24 of Local Government Act, 1894).

There must be a parish council for every rural parish (i. e. a parish in a rural district) with a population of 300 or upwards, and there may be one for any rural parish having a population of 100 or upwards. Where there is no parish council the parish meeting is, or may be, given most of the powers of the parish council (*see* s. 19 of Local Government Act, 1894).

There are no parish councils or parish meetings for parishes in urban districts.

The arrangements of the Act of 1894 as to district councils did not extend to London, where their place was taken by the vestries and district boards under the Metropolis Management Acts, now superseded by the metropolitan borough councils under the London Government Act, 1899 (62 & 63 Vict. c. 14). It must be borne in mind that the provisions as to ordinary boroughs, i. e. powers under the Municipal Corporations Act, 1882, do not apply, or only partially apply, to the metropolitan boroughs in London (*see* 62 & 63 Vict. c. 14, s. 31).

Metropolitan borough councils outside the City, and the Corporation of the City acting through the Common Council within the City, are the sanitary authorities in London.

The authorities for highways are the councils of county boroughs and of urban and rural district councils, except that the county council has powers with respect to 'main roads' outside a county borough. In London the councils of the metropolitan boroughs take the place of district councils for highway purposes.

The arrangements for the administration of the poor law and of education have not been fitted into the system of counties and county districts established under the Local Government Acts of 1888 and 1894.

A poor law union, which is the area under a board of guardians, may comprise the whole or part of one or more urban districts as well as a rural district, but in that case the individual guardians elected for parishes within so much of the union as is comprised in a rural district are identical with the district councillors (*see* s. 24 of Local Government Act, 1894).

The only public authorities for supplying elementary education are school boards. Where these do not exist school attendance committees have certain powers of compelling attendance at school. The area of a school board is a 'school district.'

The councils of counties, county boroughs, and urban districts have also powers of supplying technical instruction under the Technical Instruction Acts, 1889 and 1891 (52 & 53 Vict. c. 76; 54 & 55 Vict. c. 4). The councils of counties and county boroughs have similar powers under s. 1 of the Local Taxation (Customs and Excise) Act, 1890 (53 & 54 Vict. c. 60).

It has sometimes been found convenient to define, by reference to a schedule, the local authorities which are to administer the Act, the areas within which they are to exercise their powers, and the rate or other fund out of which their expenses are to be defrayed. (*See*, e. g., the

CH. XII. Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70, ss. 54, 92, and First Schedule.)

The ordinary expenses of local authorities are defrayed out of their local funds or rates.

The expenses of a county council are paid out of the county fund, which is raised or supplemented by means of county contributions levied on the basis of the poor rate (*see* 51 & 52 Vict. c. 41, s. 68). Their payments are distinguished as payments for general county purposes and payments for special county purposes. The expression 'general county purposes' means all purposes declared by any Act to be general county purposes, and all purposes for contribution to which the county council are for the time being authorized by law to assess the whole area of their administrative county. The expression 'special county purposes' means any purposes from contribution to which any portion of a county is for the time being exempt, and includes any purposes where the expenditure involved is by law restricted to a hundred, division, or other limited part of the county. Any costs incurred for a general county purpose are general expenses, and all costs incurred by the county council in the execution of their duties which are not by law made special expenses are to be general expenses. The expressions, 'general county account' and 'special county account,' are defined on the same principles.

The ordinary expenses of a borough council, including the council of a county borough, are paid out of the borough fund, representing the income of the borough property as supplemented by the borough rate. The borough rate is, subject to local variations, levied on the same basis as the poor rate (*see* the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, ss. 139-149). The expenses of a borough council as a sanitary authority are, subject to the provisions of Local Acts, paid out of the general district rate.

The expenses of an urban district council, not being the council of a borough, are (save in the exceptional cases mentioned in s. 207 of the Public Health Act, 1875) defrayed out of the district fund and general district rate (*see* s. 28 of Local Government Act, 1894). The general district rate is levied on the same basis as the poor rate, subject to certain exceptions and qualifications, of which the most important is that certain lands, such as agricultural lands, market gardens, railway lines, and canals, are assessed only at a fourth of their net annual value (*see* 38 & 39 Vict. c. 55, ss. 207-212).

The expenses of a rural district council are now regulated by s. 29 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), the provisions of which are general and are not confined to expenses under the Act. The expenses are divided into general expenses and special expenses. The general expenses are payable out of a common fund to be raised out of the poor rate of the parishes in the district according to the rateable value of each contributory place as defined by the Public Health Act, 1875. Special expenses are a separate charge on each contributory place. The contributions to special expenses are raised by means of a rate levied and assessed on the same basis as the poor rate, but subject to the same partial exemptions in the case of agricultural lands, market gardens, railway lines, and canals, as in the case of the general district rate (*see* 38 & 39 Vict. c. 55, ss. 229 and 230). Under s. 29 of the

Local Government Act, 1894, the Local Government Board may, however, direct that any special expenses incurred *under that Act* be raised in like manner as general expenses, i.e. without the exemptions. CH. XII.

The expenses of a metropolitan borough council are paid out of a general rate which is assessed, made, collected, and levied as if it were the poor rate (62 & 63 Vict. c. 14, s. 10).

The expenses of a parish council or parish meeting are paid out of the poor rate (*see* s. 11 of Local Government Act, 1894).

Under s. 58 of the Local Government Act, 1894, the accounts of urban district councils other than borough councils, of rural district councils, of parish councils, and of parish meetings for parishes without parish councils, are audited by district auditors, appointed by the Local Government Board under the District Auditors Act, 1879 (42 Vict. c. 6). Under s. 71 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the accounts of county councils are audited in like manner.

The accounts of borough councils outside London are audited by borough auditors, under ss. 25 and 27 of the Municipal Corporations Act, 1882, but returns of their receipts and expenditure have to be sent annually to the Local Government Board (*see* 45 & 46 Vict. c. 50, s. 28). The accounts of metropolitan borough councils are audited like the accounts of county councils (62 & 63 Vict. c. 14, s. 14).

The accounts of borough councils outside London, rural district councils, guardians, and overseers, are made up half-yearly, but those of county councils, metropolitan borough councils, urban district councils other than borough councils, parish councils, and parish meetings are made up yearly (*see* s. 58 of the Local Government Act, 1894).

Under s. 69 of the Local Government Act, 1888, a county council may, with the consent of the Local Government Board, borrow on the security of the county fund and of any revenues of the council, or of either such fund or revenues or any part of the revenues, such sums as may be required for the following purposes or any of them:—

- (a) For consolidating the debts of the county; and
- (b) For purchasing any land or building any building which the council are authorized by any Act to purchase or build; and
- (c) For any permanent work or other thing which the county council are authorized to execute or do, and the cost of which ought, in the opinion of the Local Government Board, to be spread over a term of years; and
- (d) For making advances in aid of emigration; and
- (e) For any purpose for which the county council are authorized by any Act to borrow.

Money so borrowed must be repaid within thirty years.

Where the county council are authorized to borrow, they may raise the money either as one loan or as several loans, and either by stock issued in accordance with the regulations of the Local Government Board under the Local Government Act, 1888 (*see* s. 70 of that Act), or by debentures or annuity certificates under the Local Loans Act, 1875 (38 & 39 Vict. c. 83), and the Acts amending the same, or, if special reasons exist for so borrowing, by mortgage in accordance with ss. 236 and 237 of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

Under s. 106 of the Municipal Corporations Act, 1882 (45 & 46 Vict.

CH. XII. c. 50), as amended by s. 72 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), a borough council may, with the approval of the Local Government Board, borrow at interest on the security of any corporate land or of any land proposed to be purchased by the council under the former Act, or of the borough fund or borough rate, or of all or any of those securities, such sums as the council think requisite for the purchase of land or for the building of any building which the council are by the Municipal Corporations Act authorized to build.

Under ss. 112 and 113 of the Municipal Corporations Act, 1882, as amended by s. 72 of the Local Government Act, 1888, where the Local Government Board approve of a mortgage under the former Act, they may impose conditions as to repayment of money borrowed and (amongst other things) require provision to be made for a sinking fund.

The Public Health Acts enable any sanitary authority, and therefore any district council, to borrow on the credit of the rates, subject to regulations as to a sinking fund and otherwise, prescribe a form of mortgage, provide for a register of mortgages, and for the transfer of mortgages, and enable the mortgagee to obtain the appointment of a receiver (see 38 & 39 Vict. c. 55, ss. 233-243).

Under s. 52 of the Public Health Act Amendment Act, 1890 (53 & 54 Vict. c. 59), an urban sanitary authority, and therefore now an urban district council, having power to borrow money may borrow money by the creation of stock.

Loans for poor law purposes are mainly regulated by s. 2 of the Poor Law Act, 1889 (52 & 53 Vict. c. 56), as amended by s. 1 of the Poor Law Act, 1897 (60 & 61 Vict. c. 29).

Under s. 12 of the Local Government Act, 1894, a parish council may, for certain purposes, borrow on the security of the poor rate and other revenue of the council, in like manner as a district council can borrow under the Public Health Act, but within more narrowly restricted limits.

Other modes of borrowing are provided by the Companies Clauses Acts and the Commissioners Clauses Acts.

The annual report of the Local Government Board contains useful information about local administration and finance.

Forms.

Expenses
of [district
council].

. The expenses incurred by the council of an urban district [in the execution of the additional powers conferred on the council by this Act] shall, subject to the provisions of this Act, be defrayed in a borough out of the borough fund or rate, and in any other case out of the district fund and general district rate, or other fund applicable towards defraying the expenses of the execution of the Public Health Act, 1875.

This form follows s. 28 of the Local Government Act, 1894, the application of which is not general, as in the case of s. 29, but is confined

to the additional powers conferred by the Act. As s. 29, which relates to rural district councils, is general in its application, no special provision will usually be required for the expenses of those councils. CH. XII.

For other provisions as to the expenses of district councils, see s. 11 of the Commons Act, 1899 (62 & 63 Vict. c. 30), and s. 9 (3) of the Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44). It must be remembered that the councils of county boroughs are not district councils.

—(1) The receipts of a [district council] under this Act on account of [] shall be applied [in meeting current expenditure and subject thereto] in discharging, either by way of a sinking fund, or otherwise, the debts and liabilities of the council in respect of [], or in [] under this Act, and any surplus remaining may be applied for any purpose for which capital money may be applied, and which is approved by the Local Government Board.

[(2) The receipts of the [district council] in respect of [] shall be applied in aid of the expenses incurred by them in respect of [], and so far as they are not required for the payment of those expenses, shall be applied in aid of their general [or special] expenses [as the case may be].

[(3) Provided that all receipts of a district council in pursuance of this Act, shall, in the case of a rural district, be credited to or applied for the benefit of the parish for which the land was purchased.]

This clause is suggested by provisions in s. 10 of the Allotments Act, 1887 (50 & 51 Vict. c. 48). If the expenditure under the Act is made a charge on the whole of a rural district, and not on particular parishes, the reference to special expenses and the proviso should be omitted. The reference to parishes may need explanation with reference to contributory places within the meaning of s. 229 of the Public Health Act, 1875. See s. 14 of the Allotments Act, 1887.

. Any capital money received by a [county council] in payment or discharge of purchase money for land sold by them, or in repayment of an advance made by them, shall be

CH. XII. applied with the sanction of the Local Government Board, either in repayment of debt or for any other purpose for which capital money may be applied [under this Act].

See s. 19 (4) of Small Holdings Act, 1892 (55 & 56 Vict. c. 31), s. 6 (5) of the London Government Act, 1899 (62 & 63 Vict. c. 14), and s. 9 (8) of the Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44).

Power of
county
council to
borrow.

. A county council may borrow money for the purposes of this Act in accordance with the Local Government Act, 1888, or, if the council of a county borough, with the Public Health Act, 1875 [except that any money so borrowed shall, notwithstanding anything in either of those Acts, be repaid within such period not exceeding fifty years, as the council, with the consent of the Local Government Board, determine in each case].

See s. 19 of the Small Holdings Act, 1892 (55 & 56 Vict. c. 31). The words in square brackets would negative the requirement to repay within thirty years. For a form applying to county, county borough, and district councils, see s. 29 of the Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44).

Power of
borough
council to
borrow.

. The council of a borough may borrow for the purposes of this Act in like manner as they may borrow for the purposes of the Public Health Act, 1875, and the provisions of that Act shall apply accordingly, but the money shall be borrowed on the security of the borough fund or borough rate.

See s. 6 of the Military Lands Act, 1892 (55 & 56 Vict. c. 43). This form applies the machinery of the Public Health Act, 1875, but makes the security that authorized by the Municipal Corporations Act, 1882. In many cases the borrowing powers given by the latter Act will suffice.

Power of
district
council to
borrow.

. A district council may for the purposes of this Act borrow money in like manner and subject to the like conditions as they may borrow for defraying expenses incurred in the execution of the Public Health Acts, and those Acts shall apply accordingly.

See s. 11 of the Commons Act, 1899 (62 & 63 Vict. c. 30).

Power of
[] to
borrow.

. A. [] may for any of the following purposes, that is to say—

borrow, with the consent of [
], money in like manner and subject to the like conditions as a local authority may borrow for defraying expenses incurred in the execution of the Public Health Acts, and sections two hundred and thirty-three, two hundred and thirty-four, and two hundred and thirty-six to two hundred and thirty-nine of the Public Health Act, 1875, shall apply accordingly, except that the money shall be borrowed on the security of _____ and of the whole or part of the revenues of the _____

A form like this may occasionally be useful for cases where existing borrowing powers do not suffice.

—(1) Where a local authority fail to execute or enforce any of the provisions of this Act, or of an order of the [Board of Agriculture], the Board may by order empower a person therein named to execute and enforce those provisions, or to procure the execution and enforcement thereof. Proceedings in case of default of local authority.

(2) The expenses incurred under any such order or in respect of any such default by or on behalf of the Board [including compensation for _____], shall be expenses of the local authority, and the treasurer or other proper officer of the local authority shall pay the amount of such expenses to the Board on demand, and in default of payment a person appointed by the Board to sue in that behalf, may recover the amount of such expenses, with costs, from the local authority.

(3) For the purposes of this section an order of the Board shall be conclusive in respect of any default, amount of expenses, or other matter therein stated or appearing.

(4) The provisions of this section shall be without prejudice to the right or power of the Board, or any other authority, or any person, to take any other proceedings for requiring a local authority to execute or enforce any of the provisions of this Act, or of an order of the Board.

This form follows s. 34 of the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57). For other provisions empowering a central authority to take

CH. XII. proceedings on default of a local authority *see* ss. 63-65 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75); ss. 299-301 of the Public Health Act, 1875 (38 & 39 Vict. c. 55); s. 101 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); s. 3 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51). For proceedings by county council on default of district council *see* s. 16 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), of sanitary authority, *see* s. 45 of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), and s. 100 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). As to the remedy by *mandamus*, *see* *Reg. v. Leicester Union* [1899], 2 Q. B. 632.

PROVISIONAL ORDERS AND SCHEMES.

Preliminary Note.

The object of a Provisional Order is to provide a means of obtaining Parliamentary sanction for the execution of works, or the carrying out of administrative arrangements, which are incidental to the administration of an Act, but for which the authority of a special Act would ordinarily be required. The machinery of Provisional Orders is most frequently applied for authorizing the acquisition of land by central or local authorities (*see* below under 'Acquisition of Land'). But this machinery, or the similar machinery of a scheme, is also employed in other cases where the carrying into effect of a public general Act involves interference with private or public rights. In such cases the central authority concerned makes inquiries and hears objections, and then schedules the Provisional Order or scheme, either alone or with other orders or schemes, to a confirming Bill, and procures the introduction of the confirming Bill into Parliament. Unless the Bill is opposed the adoption of this procedure obviates the expenses of appearing before a Parliamentary Committee, and the payment of the fees which are required in the case of local and personal Acts. There are also cases in which a local authority may make an order which requires confirmation by the central authority, but not by Parliament unless opposed. For a list of Acts under which Provisional Orders may be made, *see* May's *Parliamentary Practice* (tenth edition), c. xxvi.

Forms.

Confirma-
tion of
provi-
sional
order by
Parlia-
ment.

—(1) The [Board of Trade] may submit a Bill to Parliament for confirming any provisional order made by them in pursuance of this Act, and the order when so confirmed, with any modifications made therein by Parliament, shall have full effect, but shall be of no force unless and until it is so confirmed.

(2) If, while the Bill is pending in either House of Parliament, a petition is presented against any order proposed to be

confirmed thereby, the Bill, so far as it relates to the order, may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose it as in the case of private Bills.

(3) Any Act confirming any provisional order made in pursuance of this Act may, on the application of

be repealed,

altered, or amended by any subsequent provisional order made under this Act and confirmed by Parliament.

See Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 297), and Electric Lighting Act, 1882 (45 & 46 Vict. c. 56, s. 4); and for more detailed procedure see Tramways Act, 1870 (33 & 34 Vict. c. 78, ss. 4, &c.).

—(1) A scheme under this Act when settled [or approved] by shall be published in the London Gazette, and shall not be of any effect unless confirmed as in this section mentioned.

Confirmation of scheme by Parliament or Order in Council.

(2) Where, within *one month* after the publication of the scheme in the London Gazette, a petition against it by any local authority affected thereby, or by not less than

has been received by [*the authority settling or approving the scheme*] and is not withdrawn, the scheme shall require the confirmation of Parliament, and [*the authority settling or approving the scheme*] may, if they think fit, submit it to Parliament for confirmation; but otherwise, at any time after the expiration of the said month, or after the withdrawal of any petition that has been presented, [*the authority settling or approving the scheme*] may, if they think fit, submit the scheme for confirmation, either to Parliament or to His Majesty in Council, and in the latter case it shall be lawful for His Majesty to confirm the scheme by Order in Council.

(3) If, while a Bill confirming any scheme under this Act is pending in either House of Parliament, a petition is presented against the scheme, the Bill [so far as it relates to that scheme] may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose it as in the case of private Bills.

CH. XII. (4) A scheme, when confirmed by Parliament or by Order in Council, shall have full operation, with, in the former case, such modifications, if any, as are made therein by Parliament, as if the scheme were part of this Act.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 213); Endowed Schools Act, 1873 (36 & 37 Vict. c. 87, ss. 13-15); Fisheries Act, 1877 (40 & 41 Vict. c. 42, s. 7); Divided Parishes, &c., Act, 1876 (39 & 40 Vict. c. 61, ss. 1, 2); Labourers (Ireland) Act, 1883 (46 & 47 Vict. c. 60, s. 8); Shannon Act, 1885 (48 & 49 Vict. c. 41, s. 4); Educational Endowments (Ireland) Act, 1885 (48 & 49 Vict. c. 78, s. 4); Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 57); Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70, ss. 7-9); London Government Act, 1899 (62 & 63 Vict. c. 14, s. 16).

ORDERS IN COUNCIL, RULES, REGULATIONS, AND BY-LAWS.

Preliminary Note.

It is often necessary to supplement the general provisions of an Act of Parliament by delegating to some executive authority, central or local, the power of making rules or regulations on matters of detail. The extent to which such a power should be delegated always requires careful consideration¹. The power should not extend to matters of principle on which a decision of Parliament ought to be taken. In particular it should not authorize the imposition of penalties except such penalties as are usually attached to the breach of by-laws. In some cases the control of Parliament should be reserved by requiring drafts of the proposed rules or regulations to be laid before each House for a specified time, or by providing that they are not to come into operation until they have been so laid. In some cases also provision should be made for submitting the drafts to criticism by local authorities and classes of persons interested. Care should always be taken to see that provision exists or is made for the due promulgation of such rules and regulations, for enabling copies to be easily obtained, and for facilitating their proof in legal proceedings. The sections of the Public Health Act, 1875, relating to by-laws (38 & 39 Vict. c. 55, ss. 182-186), make provision for all these points, and may be adopted by reference or otherwise where the power of making by-law is given to a local authority.

The statutory rules and orders of each year, except those which are merely local and temporary, are now published in annual volumes by the Stationery Office, and an index to the statutory rules and orders for the time being in force is periodically brought out. The Stationery Office has also brought out, under the title of the Statutory Rules and Orders Revised, a complete edition of the statutory rules and orders made before 1890 and still in force.

S. 1 of the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), printed in Appendix III, requires previous publication for forty days of the draft

¹ See Ch. III.

of certain proposed statutory rules which have to be laid before Parliament, but this requirement is subject to numerous exceptions (see subsection (4)).

S. 3 of the same Act provides for the printing, numbering, and sale of statutory rules, and enacts that where any statutory rules are required by any Act to be published or notified in the London, Edinburgh, or Dublin Gazette, a notice in the Gazette of the rules having been made, and of the place where copies of them can be purchased, is to be a sufficient compliance with the requirement. It is therefore no longer proper to require that statutory rules should be *published* in the Gazette. Notification will be sufficient.

The intention of Parliament in requiring that rules, orders, or schemes, or their drafts, should be laid on the table of the House or of both Houses, for a certain time before taking effect, is to provide a reasonable time for Parliamentary criticism. This intention was often defeated by the practice of laying drafts on the table in dummy. Now, however, the House of Lords has, by an Order of March 29, 1900, directed 'that where by statute any scheme before it can be sanctioned by Order in Council is ordered to lie on the table for a prescribed number of days, it shall be laid on the table in a printed form and not otherwise; and thereupon shall forthwith be circulated to the members of this House.' And the Speaker of the House of Commons has issued an Order, dated April 13, 1900, that 'when a statute provides that any document shall lie on the table of the House for a certain number of days, it shall not be deemed to have been laid on the table until a complete copy thereof has been laid thereon.'

Forms.

—(1) His Majesty the King in Council may make Orders for the purposes of this Act, and revoke or vary any Order so made; and every Order so made shall, while in force, have the same effect as if enacted in this Act.

Power for His Majesty to make Orders in Council.

(2) Every Order in Council made in pursuance of this Act shall be laid before both Houses of Parliament as soon as may be after it is made, [and shall be printed by the King's printer, and published under the authority of His Majesty's Stationery Office, and notified in the London Gazette].

[See 54 & 55 Vict. c. 31, s. 1.]

See the Mail Ships Act, 1891 (54 & 55 Vict. c. 31, s. 1).

Orders in Council made under the powers given by an Act would usually be made at the instance of the central authority responsible for the execution of the Act.

The implied power of revocation and amendment given by s. 32 (3) of the Interpretation Act, 1889, does not apply to Orders in Council, though it would probably apply to rules and regulations made by order of the King in Council. But it may be desirable to remove any doubt on this point (see 55 & 56 Vict. c. 23, s. 21 (i)).

CH. XII. Documents purporting to be printed by the Government Printer (which, as defined by 31 & 32 Vict. c. 37, s. 5, includes the King's Printer) or under the superintendence or authority of His Majesty's Stationery Office, are made receivable in evidence by the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), as supplemented by s. 2 of the Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9).

The directions as to printing, publication, and notification are probably unnecessary. If the Order is of the nature of a statutory rule it will fall within the provisions of the Rules Publication Act, 1893.

Power for King in Council to make regulations.

—(1) His Majesty the King in Council may make regulations with respect to all or any of the following matters; namely,—

(a)

(b)

(c)

(2) All regulations purporting to be made in pursuance of this section may be made either generally or with reference to any particular case or class of cases, and shall be printed by the King's Printer, and published under the authority of His Majesty's Stationery Office, and laid before both Houses of Parliament, [and be deemed to be within the powers of this Act,] and shall while in force have effect as if enacted in this Act.

See the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23, s. 21).

The words 'and be deemed,' &c., should not, as a rule, be inserted. It may be doubted whether the words 'shall have effect as if enacted in this Act' are more than declaratory. But importance seems to have been attached to them by the House of Lords in the case of *Institute of Patent Agents v. Lockwood* (1894), L. R. App. Cas., 347.

Draft of Order to be laid before Parliament.

. Before any such order is made, the draft thereof shall be laid before each House of Parliament for a period of not less than *thirty* days during the session of Parliament, and if either House before the expiration of that period presents an address to His Majesty against the draft or any part thereof, no further proceedings shall be taken thereon, but without prejudice to the making of any new draft order.

See 52 & 53 Vict. c. 30, s. 4 ; 61 & 62 Vict. c. 44, s. 5 ; 62 & 63 Vict. c. 14, s. 15. In the case of Orders in Council it is not usual to submit the order after it is made to any veto by Parliament, but it may be provided that the order shall be made on the recommendation of a Secretary of State,

or shall confirm a scheme, and that the recommendation or scheme, or a draft of the order, or the document which is to be carried into effect by the Order in Council, shall be laid before Parliament for a certain period before it is submitted to His Majesty in Council. CH. XII.
—

Under the Standing Orders a discussion on a draft order or rule may be taken after 12 o'clock.

. A Secretary of State [the Lord Chancellor] may [with the concurrence of the Treasury as to fees] make rules for carrying into effect the objects of this Act [and in particular for all or any of the following purposes; (that is to say),

(a)

(b)

(c)

(d)]

All rules made under this section [Act] shall be laid before both Houses of Parliament as soon as may be after they are made, and shall be printed by the King's Printer and published under the authority of His Majesty's Stationery Office, and shall be judicially noticed, and shall have effect as if enacted by this Act. Power to make rules.
Rules to be laid before Parliament.

Under s. 32 of the Interpretation Act, 1889, a power to make rules, regulations or by-laws, implies a power to rescind, revoke, amend or vary them.

. Every rule under this Act shall be laid before each House of Parliament forthwith, and if an address is presented to His Majesty by either House of Parliament within the next subsequent *forty* days on which that House has sat next after any such rule is laid before it, praying that the rule may be annulled, His Majesty in Council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything done thereunder. Rules to be subject to disallowance by Parliament.

This is substantially the form adopted in the Judicature Acts with respect to rules of court (38 & 39 Vict. c. 77, s. 25), and in the Tithe Act, 1891 (54 & 55 Vict. c. 8, s. 3). It brings the rules into operation at once.

It will be observed that this form gives *each* House of Parliament a power of disallowance. The limit of time adopted in this form excludes any days on which the House has not actually sat, and this may be inconvenient, especially in the case of the House of Lords.

CH. XII. . Before any rules are made under this Act a draft thereof shall be laid before each House of Parliament for a period of not less than *thirty* days during the session of Parliament, and if either House before the expiration of that period presents an address to His Majesty against the draft or any part thereof, no further proceedings shall be taken thereon, but without prejudice to the making of any new draft rules.

Draft of rules to be laid before Parliament.

See 52 & 53 Vict. c. 30, s. 4 ; 61 & 62 Vict. c. 41, s. 2. The adoption of this form may materially delay the coming into operation of the rules. For a form involving a shorter period of delay, *see* 59 & 60 Vict. c. 16, s. 6 (3).

If previous publication of the draft rules is required it will be more convenient to apply s. 1 of the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), unless that section already applies.

Power of local authority to make by-laws. 38 & 39 Vict. c. 55. . The provisions with respect to by-laws contained in sections one hundred and eighty-two to one hundred and eighty-six of the Public Health Act, 1875, and any enactment amending or extending those sections, shall apply to all by-laws made by a local authority under this Act.

See 53 & 54 Vict. c. 59, s. 9 ; 62 & 63 Vict. c. 30, s. 10. This form applies by reference the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), with respect to by-laws, and may be adopted in most cases where the power of making by-laws is given to local authorities. For another form, *see* 61 & 62 Vict. c. 29, s. 6. As to the reasonableness of by-laws, *see* *Kruse v. Johnson* [1898] 2 Q. B. 91 ; *White v. Morley* [1899] 2 Q. B. 34 ; *Thomas v. Sutters* [1900] 1 Ch. 10.

The council of every municipal borough have power under s. 23 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), to make by-laws 'for the good rule and government of the borough and for the prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough.' If these by-laws relate to nuisances within the meaning of the Public Health Acts, they require the approval of the Local Government Board, and must be published in manner required by the Public Health Act, 1875, ss. 182-188. In any other case they require the approval of the Home Office, and are subject to the provisions as to publication and other matters contained in s. 3 of the Municipal Corporations Act, 1882.

Under s. 16 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), a county council have the same power of making by-laws in relation to their county or to any specified part or parts thereof as the council of a borough have of making by-laws in relation to their borough under s. 23 of the Municipal Corporations Act, 1882; and s. 187 of the Public Health Act, 1875, is to apply to such by-laws. But county by-laws are not to be in force within a borough. The councils of metropolitan boroughs

have power to make by-laws under s. 5 (a) of the London Government Act, 1899 (62 & 63 Vict. c. 14), and Part II of the Second Schedule to that Act. They also have power as sanitary authorities to make by-laws under s. 114 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76).

The councils of urban districts, not being boroughs, and of rural districts, have power to make by-laws under the Public Health Act. There are many other statutory provisions under which by-laws can be made.

The procedure for making by-laws under the Municipal Corporations Act, 1882, differs somewhat from that under the Public Health Act. A by-law under the Municipal Corporations Act cannot be made unless two-thirds of the whole number of the council are present, and cannot come into operation for at least forty days. A copy must be sent to the Secretary of State, and within forty days the King in Council may disallow the by-law or postpone the time of its commencement. No express provision is made for the punishment of continuing offences. Under sections 182-186 of the Public Health Act, 1875, provision is made for continuing offences, and by-laws do not take effect until they have been submitted to and confirmed by the Local Government Board. A month's notice of the proposed by-law must be given in the local papers, and by-laws when made must be hung up in the office of the local authority, and ratepayers on application are entitled to copies.

'A by-law,' says Lord Abinger, 'has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an Act of Parliament has upon the subjects at large.' *Hopkins v. Mayor of Swansea* (1839) 4 M. & W. at page 640.

. All by-laws made by [a county council] under this By-laws. Act shall be made subject and according to the provisions with respect to by-laws contained in sections one hundred and eighty-two to one hundred and eighty-six of the Public Health Act, 1875, [and set forth in the First Schedule to this Act,] and those sections shall apply in like manner as if the [county council] were a local authority within the meaning of that Act. 38 & 39
Vict. c. 55.

See the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 114). As a rule it is not desirable to schedule such well-known provisions as those of the Public Health Act.

.(1) The [local authority] may make by-laws for all or any of the following purposes; that is to say,

(a)

(b)

(c)

(2) By any by-laws made in pursuance of this section a fine may be imposed for the breach of any such by-law, but shall not exceed *two pounds* for any one offence, or in the case of a continuing offence *one pound* for every day during which the offence is continued, [and shall not be a minimum fine].

(3) A by-law made in pursuance of this section shall not be valid until it has been confirmed by a Secretary of State [or the Local Government Board], and shall not be so confirmed until the expiration of at least one month after public notice of the intention to apply for the confirmation has been given by the local authority in some newspaper circulating within the district to which the by-law relates, or by hand-bills, or otherwise in such manner as the confirming authority consider sufficient.

(4) During the month next preceding the application for confirmation of a by-law the local authority shall cause a printed copy of the by-law to be kept at their office in such manner as to be open during office hours to the inspection of all persons interested, without fee, and shall also supply printed copies thereof to any applicant on payment of a sum not exceeding sixpence for each copy.

(5) The local authority shall supply copies of all by-laws made under this section, and for the time being in force, to any applicant on payment of a sum not exceeding sixpence for each copy.

(6) The production of a copy of any by-law certified by a person purporting to be the clerk of the local authority to be a true copy, and to have been duly confirmed, shall be evidence of the by-law and of the due making and confirmation thereof.

(7) Any offence against a by-law made in pursuance of this section may be prosecuted and any fine in respect thereof may be recovered in manner directed by the Summary Jurisdiction Acts.

(8) [If for a period of *four months* after the passing of this

Act the local authority fail in exercising the powers of making by-laws given by this Act, the [Local Government Board] may, by order published in such manner as that Board may direct, make such by-laws of their own motion, and all by-laws so made shall have the same effect and may be enforced in like manner as by-laws made by the local authority and duly confirmed by the [Local Government Board].

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See the Explosives Act, 1875 (38 & 39 Vict. c. 17, ss. 34-38), the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, ss. 23, 24), and the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59, s. 13). This form, or a simpler form to the like effect, may be employed where it is not considered expedient to incorporate by reference or to schedule to the Act the provisions of the Public Health Act, 1875.

ACQUISITION OF LAND.

Preliminary Note.

It is often necessary to give local authorities and other bodies power to acquire land, compulsorily or otherwise, for public purposes.

The general law relating to the acquisition of land for public purposes is to be found in the Lands Clauses Acts and in the standing orders of the two Houses of Parliament.

The standing orders relating to local Bills require the promoters of any such Bill which gives power to take compulsorily land or rights over land to give certain notices in the latter part of the year preceding the introduction of the Bill.

Notice of the objects of the Bill must be published in each of two successive weeks, in the months of October and November, or one of them, in the London Gazette and in some local newspaper.

On or before December 15, applications in writing must be made to the owners and occupiers of the lands required for the purposes of the Bill, and then a list must be drawn up showing which of the persons to whom applications are made assent, dissent, or are neuter.

On or before November 30, plans of the lands required and a book of reference must be deposited at the Private Bill Office, and with clerks of the peace, parish clerks, and clerks of sanitary authorities.

On or before December 21, prints of the proposed Bill must be deposited in the Private Bill Office.

Parliament when passing a local Act which gives power to take land does not allow any material departure to be made from the general provisions of the Lands Clauses Acts. The most important modifications allowed in recent Acts have been the addition of a power to take easements by agreement, the insertion of clauses relaxing in certain cases the requirement (by s. 92) to take the whole of any 'house or other building or manufactory' if any part is touched, and the modification of the provisions as to compensation.

CH. XII. The relaxation of the requirement to take the whole of a building is usually accompanied by what are commonly called the under-pinning clauses, by which underground railway companies have been required to strengthen the foundations of houses near their lines¹.

The Metropolitan Inner Circle Act, 1874, contained provisions requiring 'proper compensation' to be made for structural injury arising from the working of the railway within three years after construction and for injury to trade by obstruction of access or decrease of traffic, whether temporary or permanent.

Any landowner whose interests are affected by a local and personal Bill giving power to take land has a *locus standi* to appear and oppose the whole Bill.

Provision has been made by sundry public general Acts for cheapening and otherwise improving the procedure under the Lands Clauses Acts in particular cases.

Thus, under the Allotments Act, 1887 (50 & 51 Vict. c. 48, s. 3), any question of disputed compensation is to go to a single arbitrator instead of being determined by a jury. The same provision was applied by s. 9 (10) of the Local Government Act, 1894 (56 & 57 Vict. c. 73), to the taking of land under that Act. Similar provisions of a more elaborate nature are to be found in s. 41 of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70). And under s. 20 of the Military Lands Act, 1892 (55 & 56 Vict. c. 43), the person or authority acquiring the land may require the compensation to be settled by arbitration instead of by a jury. See also s. 13 of the Light Railways Act, 1896 (59 & 60 Vict. c. 48).

The Housing of the Working Classes Act, 1890, lays down certain rules as to the principles on which compensation is to be assessed, and expressly declares that no additional allowance is to be made in respect of compulsory purchase. There is the same provision as to compulsory purchase in s. 9 (10) of the Local Government Act, 1894. It will be borne in mind that this allowance rests, not on statute, but on custom.

The necessity of making compensation in the first instance for the several interests affected instead of awarding a lump sum to be subsequently divided is a source of expense. Attempts have been made by some Acts to cheapen the procedure in this respect. See, e.g., s. 41 (6) of the Housing of the Working Classes Act, 1890.

The Lands Clauses Acts were framed with special reference to railway companies and other bodies seeking power to take lands by local and personal Acts for commercial purposes, and their language requires adaptation to make it suitable to the case of local authorities or other similar bodies acting under public general Acts. Sections authorizing sanitary authorities, school boards, and other similar bodies to avail themselves of the provisions of the Lands Clauses Acts, are of frequent occurrence in general Acts of Parliament, but until recently the exercise of the compulsory powers under the Acts has usually been made subject

¹ See Clifford's *History of Private Bill Legislation*, ii. 526, and clauses 8, 9, and 10, among the special clauses relating to the taking of lands in the Model Bills and Clauses issued by the Chairman of Committees of the House of Lords.

to conditions which ensure that the exercise of the power is brought under the review of Parliament by means of a special Act.

The machinery for this purpose has usually been as follows :—

The local authority is required to publish and serve notices of the same kind as those required by the standing orders of Parliament, and usually at the same time of the year. The authority is then authorized to present a petition to the Local Government Board or some other department of Government, specifying the lands required, the names of the owners and occupiers who have assented, dissented, or are neuter, and praying for an order authorizing the authority to put in force, with respect to the lands, the compulsory provisions of the Lands Clauses Acts.

The Government department is thereupon authorized to hold a local inquiry, and, if satisfied with the result, makes a Provisional Order giving the requisite powers to the local authority, but the Provisional Order is not to be of any validity unless and until it has been confirmed by Parliament. The Bill confirming the Order is introduced by the department which sanctions the Order, and thus, if the Bill is unopposed, as is usually the case, the local authority is saved the heavy expenses incidental to the preparation and passing through Parliament of a special Act. *See* Public Health Act, 1875 (38 & 39 Vict. c. 55, ss. 175, 176).

In some cases public departments have been given power to acquire land compulsorily, under the authority of a Provisional Order confirmed by Act of Parliament. Instances of provisions for this purpose will be found in the Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), the Metropolitan Police Act, 1886 (49 Vict. c. 22), and the Military Lands Act, 1892 (55 & 56 Vict. c. 43, s. 2).

A public department does not gain any advantage in respect of fees by adopting this machinery, because it is in any case exempted from payment of the fees, but the requirements of the Act as to the service of notices and the like are usually more elastic than the requirements of standing orders in the case of ordinary local and personal Acts.

The effect of requiring a special Act either to give powers for taking lands compulsorily, or to confirm such powers when given by a Provisional Order, is that it is left to Parliament to determine with reference to each particular case :—

- (1) Whether the public need justifies compulsory acquisition ;
- (2) Whether the particular lands proposed to be taken are those which ought to be taken ; and
- (3) Whether the proposed arrangements for compensating or preventing unnecessary injury to private interests are adequate.

Under the Public Health Act, 1875 (38 & 39 Vict. c. 55, ss. 175, 176), urban and rural sanitary authorities have power to acquire land either by agreement or by compulsion for the purposes of the Public Health Acts, and for that purpose to employ the Provisional Order machinery described above. S. 178 of the Public Health Act, 1875, gives power to the Duchy of Lancaster to sell land for the purposes of the Acts.

Under s. 65 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), a county council may acquire land, either by agreement, or by compulsion, for the purpose of any of their powers and duties, and in accordance with the machinery provided by the Public Health Act, 1875.

CH. XII. Under s. 107 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), as amended by s. 72 of the Local Government Act, 1888, a municipal corporation may acquire land with the consent of the Local Government Board. But this provision does not give compulsory powers of purchase.

The cases in which compulsory powers of taking land may be exercised without the authority either of a special Act or of Provisional Orders confirmed by a subsequent Act are not numerous, and are usually cases where the exact situation of the land to be acquired is defined by the circumstances of the case. To this class belong the power to take land for widening a highway under the Highway Act, 1835 (5 & 6 Will. IV. c. 50, s. 85), the power to take land for enlarging a prison under the Prison Act, 1865 (28 & 29 Vict. c. 126, s. 44); the power to take land for enlarging a workhouse under the Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6, ss. 52-54), and the powers exercisable by London vestries and district boards (now metropolitan borough councils) under Michaelangelo Taylor's Act of 1817 (57 Geo. III. c. xxix, s. 80), as extended by the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102, ss. 72, 73).

Exceptional powers of taking land compulsorily are given by the Admiralty (Signal Stations) Act, 1815 (55 Geo. III. c. 128), by the Defence Act, 1842 (5 & 6 Vict. c. 94, ss. 10, 18, 19), and by the Coast Guard Service Act, 1856 (19 & 20 Vict. c. 83).

Under the Labourers (Ireland) Act, 1885 (48 & 49 Vict. c. 77), as amended by s. 12 of the Act of 1886 (49 & 50 Vict. c. 59), the Irish Local Government Board may by a Provisional Order empower a sanitary authority to take land compulsorily, subject only to an appeal to the Lord Lieutenant in Council, and without going to Parliament.

By s. 3 of the Allotments Act, 1887 (50 & 51 Vict. c. 48), special adaptations of the Lands Clauses Acts are made for enabling sanitary authorities to acquire land for allotments.

Objection has sometimes been taken to the Provisional Order machinery for acquiring land as needlessly cumbrous, dilatory, and expensive, and by s. 9 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), power was given to acquire land compulsorily for allotments and for parish purposes under the authority of an order of the county council confirmed by the Local Government Board. Under s. 10 of the same Act there is power to hire compulsorily for allotments under the like authority.

A further extension was given to this principle by the Light Railways Act, 1896 (59 & 60 Vict. c. 48), under which land may be taken compulsorily under the authority of an order of the Board of Trade, without confirmation of the order by Parliament (*see* ss. 7, 10, 11, 12).

Powers analogous to those of taking land are those of using roads for tramway purposes. *See* the Tramways Act of 1870 (33 & 34 Vict. c. 78), and the Military Tramways Act, 1887 (50 & 51 Vict. c. 65).

Forms.

Power to purchase land.

—(a) A [local authority] may [with the consent of the Local Government Board] purchase such land as they may require for the execution of their duties.

(b) A [local authority] may, for the purposes and subject CH. XII.
to the provisions of this Act, acquire, purchase, take on lease,
sell, or exchange any land, whether situate within or without
their district.

See Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 65.

(1) For the purpose of the purchase, taking on lease, or exchange of lands under this Act, sections one hundred and seventy-six, one hundred and seventy-eight, two hundred and ninety-seven, and two hundred and ninety-eight of the Public Health Act, 1875, shall apply as if they were herein re-enacted and in terms made applicable to the purposes of this Act. Machinery for purchase of land. 38 & 39 Vict. c. 55.

(2) Sub-sections one and five of section eighty-seven of the Local Government Act, 1888, shall apply to any of the proceedings of the Local Government Board under or for the purposes of this section. 51 & 52 Vict. c. 41.

See 51 & 52 Vict. c. 41, s. 65; 62 & 63 Vict. c. 14, s. 28. This clause gives power to take land, either by agreement, or compulsorily under the authority of a Provisional Order obtained in accordance with the provisions of the Public Health Act, 1875, and confirmed by Parliament.

Section 176 of the Public Health Act, 1875, regulates the notices to be given and other steps to be taken when application is made to the Local Government Board for a Provisional Order. S. 178 merely gives power to sell Duchy of Lancaster lands. Ss. 297 and 298 regulate the making of Provisional Orders. Sub-sections (1) and (5) of s. 87 of the Local Government Act, 1888, enable the Board to hold local inquiries, and provide for the expenses of those inquiries.

For a form giving power to a public department to take land, see s. 2 of the Military Lands Act, 1892 (55 & 56 Vict. c. 43, as amended by 63 & 64 Vict. c. 56, s. 4). This form allows the notices to be served at any time of the year. A similar latitude as to time has been allowed in Ireland by 48 & 49 Vict. c. 77, s. 19 amending 46 & 47 Vict. c. 60, s. 7, and by 56 & 57 Vict. c. 41, s. 1 amending 55 & 56 Vict. c. 42.

The Light Railways Act, 1896 (59 & 60 Vict. c. 48), while requiring applications to be advertised and notices to be served, leaves other details to be regulated by the Commissioners, and, as has been observed above, the order which authorizes the taking of the land does not require confirmation by Parliament.

For the purpose of the purchase of land under this Act by a [] authority the Lands Clauses Acts shall be incorporated with this Act, except the provisions of those Acts with respect to the purchase and taking of land other-

CH. XII. wise than by agreement, and section one hundred and seventy-eight of the Public Health Act, 1875, shall apply as if the [] authority were referred to therein.

See Small Holdings Act, 1892, 55 & 56 Vict. c. 31, s. 3.—This clause gives power to acquire land by agreement only, and incorporates the provisions of the Lands Clauses Acts with respect to persons under disability, &c.

LEGAL PROCEEDINGS.

Preliminary Note.

The courts to which it is ordinarily necessary to refer in Acts of Parliament are—

For civil proceedings, the High Court and county courts ;

For criminal proceedings, courts of assize (which are defined by s. 13 (4) of the Interpretation Act, 1889, to include the Central Criminal Court, and courts of oyer and terminer, and gaol delivery), courts of quarter sessions (*see* s. 13 (14) of the Interpretation Act), and courts of summary jurisdiction, in other words petty sessions and stipendiary magistrates' courts, as to which *see* s. 13 (11) of the Interpretation Act.

It is also sometimes necessary to utilize the civil jurisdiction which before the establishment of county courts was extensively exercised by justices of the peace, and which is now regulated by ss. 6 and 35 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

Where the penalty imposed is a small fine, or a short term of imprisonment, the jurisdiction is usually given to courts of summary jurisdiction.

For this purpose it is sufficient to use the expression 'shall be liable on summary conviction.' *See* 42 & 43 Vict. c. 49, s. 51. If it is necessary to refer to a court of summary jurisdiction it must be remembered that this expression, though defined for England and Ireland by s. 13 of the Interpretation Act, 1889, is not so defined for Scotland, and will therefore require a special definition if the Act extends to Scotland. *See* note on s. 14 (11) of Interpretation Act below.

The procedure in cases before courts of summary jurisdiction is regulated by the Summary Jurisdiction Acts, of which the most important are, as to England, the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), *see* s. 13 (7) of the Interpretation Act, 1889.

The scale of imprisonment for non-payment of a fine is regulated by s. 5 of the Summary Jurisdiction Act, 1879.

Subject to any special directions in the Act under which a fine is imposed, a fine recovered before a court of summary jurisdiction is, if recovered before county justices, paid to the county treasurer, and if recovered before borough justices, paid to the borough treasurer, and applied in aid of the borough or county fund, as the case may be (*see*, as to counties, 11 & 12 Vict. c. 43, s. 31; and as to boroughs, 45 & 46 Vict. c. 50, s. 221). Justices' clerks have to account for fines recovered (*see* 11 & 12 Vict. c. 43, s. 31, and 40 & 41 Vict. c. 43, s. 6).

Many statutes contain special provisions as to the application of fines. Thus, it is sometimes provided that some portion of a fine, usually not exceeding one-half, may be paid to the informer or prosecutor (*see, e. g., 38 & 39 Vict. c. 55 (Public Health Act, 1875), s. 254*). Sometimes also some part of the fine is allowed to be paid as compensation to the person aggrieved, as in the case of fines under the Merchant Shipping Acts, 1894 (*57 & 58 Vict. c. 60, s. 699*).

Fines in respect of matters administered by a central department are usually required to be paid into the Exchequer (*see, e. g., s. 699 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 96 of the Explosives Act, 1875 (38 & 39 Vict. c. 17)*). In the case of matters administered by a local authority, the fine is usually paid to that authority (*see, e. g., s. 254 of the Public Health Act, 1875, 38 & 39 Vict. c. 55*).

Fines under statutes regulating corporations established for public purposes are often payable to the corporation (*see, e. g., ss. 84, 99, 103, 105, 116, 119 of the Railways Clauses Act, 1845, 8 & 9 Vict. c. 20, and ss. 58, 59 of the Cemeteries Clauses Act, 1847, 10 & 11 Vict. c. 65*).

Under s. 17 of the Summary Jurisdiction Act, 1879, a person charged before a court of summary jurisdiction with an offence for which he would be liable on conviction to more than three months' imprisonment, and which is not an assault, may claim to be tried by a jury.

Under s. 19 of the same Act, a general right to appeal is given in all cases where a person is adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine (including imprisonment for non-compliance with a summary order, but excluding failure to comply with an order for the payment of money, the finding of sureties, entering into any recognizance, or giving any security), provided he did not plead guilty or admit the truth of the information or complaint. In many cases a right of appeal is given by the special Act.

The procedure on appeal to quarter sessions is regulated by s. 31 of the Summary Jurisdiction Act, 1879. Under 20 & 21 Vict. c. 43 and s. 33 of the Act of 1879, there is an appeal by special case on points of law to the High Court.

In some cases it may be necessary to make special provision as to the expenses of indictments.

In felonies the court may order payment out of the local rate to the prosecutor and his witnesses of a reasonable sum for expenses, whatever the result of the trial may be, and even if no bill be found (7 Geo. IV. c. 64, ss. 22, 24, 25); also to the prisoner's witnesses who are bound over by the magistrate in misdemeanour, as well as felonies, 30 & 31 Vict. c. 35, s. 5. The provision as to the payment of the costs of prosecution extends to many misdemeanours (under 7 Geo. IV. c. 64, s. 23, 14 & 15 Vict. c. 55, the Consolidation Acts of 1861, &c.). It is applied by s. 28 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), to cases where an indictable offence is dealt with summarily.

In treason and felony the prisoner can be ordered to pay the costs of the prosecution (33 & 34 Vict. c. 23, s. 3).

Where a bill of indictment is preferred under the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), against a person who has not been detained in custody or bound over to answer the indictment and he is acquitted, the prosecutor may be ordered to pay the defendant's costs.

Forms.

CH. XII. . The expenses of any prosecution on indictment under this Act shall be payable as in cases of indictment for felony.

Expenses of indictments.

See s. 18 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); s. 20 of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41); and s. 1 of the Inebriates Act, 1899 (62 & 63 Vict. c. 35).

Summary prosecution of offences.

. Any offence under this Act which is punishable on summary conviction may be prosecuted, and any fine under this Act which is recoverable on summary conviction may be recovered—

(a) In the Isle of Man before a high bailiff or two justices of the peace at the instance [of an officer of the post office or] of a constable in accordance with the law for the time being in force for regulating the exercise of summary jurisdiction by such bailiff or justices; and

(b) In the Channel Islands, or elsewhere than in the United Kingdom or the Isle of Man, before the court and in the manner provided by law, and if no provision is otherwise made by law, then at the instance of [any officer of the post office] before the court and in the manner before and in which the like offences and fines can be prosecuted and recovered.

See s. 12 of the Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76). But this clause will be unnecessary unless the Act extends beyond the United Kingdom.

Exemption of occupier from fine on proof of another being actual offender.

—(1) Where an offence for which the occupier of is liable under this Act to a fine has in fact been committed by some agent, servant, workman, or other person, that agent, servant, workman, or other person shall be liable to the like fine as if he were the occupier.

(2) Where the occupier is charged with any such offence he shall be entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge; and if, after the commission of the offence

has been proved, the court is satisfied that the occupier of Cz. XII.
the had used due diligence to enforce the execution
of the Act, and that the other person had committed the
offence in question without the occupier's knowledge, consent,
or connivance, the other person shall be summarily convicted
of the offence, and the occupier shall be exempt from any fine.

(3) When it is made to appear to the satisfaction of an
inspector, at the time of discovering the offence, that the
occupier had used all due diligence to enforce the execution
of this Act, and also by what person the offence had been
committed, and also that it had been committed without the
knowledge, consent, or connivance of the occupier and in
contravention of his order, then the inspector shall proceed
against the person whom he believes to be the actual offender
in the first instance without first proceeding against the
occupier.

See ss. 86 and 87 of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16); also s. 39 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 6 of the Irish Education Act, 1892 (55 & 56 Vict. c. 42), s. 87 of the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 5 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 12 of the Truck Amendment Act, 1887 (50 & 51 Vict. c. 46, s. 12), and s. 13 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29). For clause exempting from penalty, on proof that due care has been taken, *see also* s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), and s. 6 of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

. Where on the conviction of any person under this Act Compensation for
damage
caused by
offence.
for an offence it appears to the court that any injury to
person or property has been caused by the offence, the court
may by the conviction adjudge the person convicted to pay
in addition to any fine a reasonable sum as compensation for
the injury, and that sum may be recovered as a fine under
this Act, and when recovered shall be paid to the person
injured.

See s. 15 of Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22).

. Where any person is guilty of any offence which under Imprison-
ment for
wilful act
or neglect
this Act is punishable by a fine, and which, in the opinion
of the court that tries the case, was reasonably calculated to

CH. XII. endanger the safety of, or to cause serious personal injury to; any of the public [or the persons employed in or about], or to cause a dangerous accident, and was committed wilfully by the personal act, personal default, or personal negligence of the person accused, that person shall be liable, if the court is of opinion that a fine will not meet the circumstances of the case, to imprisonment, with or without hard labour, for a period not exceeding *six months*.

endanger-
ing life or
limb.

See s. 79 of Explosives Act, 1875 (38 & 39 Vict. c. 17); and s. 17 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51).

FORM, SERVICE, INSPECTION, AND EVIDENCE OF DOCUMENTS.

Forms.

Form of
notices,
&c.

. All notices and orders under this Act must be in writing; and, where any notice, order, or document under this Act requires authentication by the [local authority], the signature thereof [by the clerk of the local authority] shall be sufficient authentication.

See 54 & 55 Vict. c. 76, s. 127. The provision as to authentication is often unnecessary.

Service of
notices,
&c.

(1) Any notice, order, or other document required or authorized to be served under this Act may be served either—

- (a) By delivering it [or a true copy of it] to the person on whom it is to be served; or
- (b) By leaving it [or a true copy of it] at the usual or last known place of abode of that person; or
- (c) By forwarding it [or a true copy of it] by post in a prepaid letter addressed to that person at his usual or last known place of abode; or
- (d) If addressed to the owner or occupier of premises, by delivering it [or a true copy of it] to some person on the premises, or if there is no person on the premises

who can be so served, then by fixing it [or a true copy CH. XII. of it] on some conspicuous part of the premises.

(2) Any notice, order, or other document by this Act required or authorized to be [given to or] served on the owner or occupier of any premises may be addressed by the description of the 'owner' or 'occupier' of the premises (naming them), without further name or description.

(3) Any notice required or authorized for the purpose of this Act to be served on [the council of a borough or other urban district] shall be deemed to be duly served if in writing, delivered at or sent by post to the office of the council, addressed to that council, or to their clerk.

See s. 128 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). As to service of documents by post, see s. 26 of Interpretation Act, 1889. The provisions of the Summary Jurisdiction Acts as to service of summonses should be borne in mind. See R. v. Mead [1898] 1 Q.B. 110.

—(1) Any member of a [local authority], without payment and any ratepayer [or other person interested], on payment of a fee not exceeding *one shilling*, may at any reasonable time inspect the minute books and documents in the possession or under the control of the [local authority], and shall be entitled to obtain copies and extracts therefrom on payment of such fee not exceeding _____, as may be fixed by the [local authority]. Inspection of documents.

(2) If any person, having the custody of any book or document—

(a) obstructs any person authorized to inspect the same in making any inspection thereof which he is entitled to make under this section; or

(b) refuses to give copies or extracts to any person entitled to obtain the same under this section;

he shall, on summary conviction, be liable to a fine not exceeding two pounds.

See also 33 & 34 Vict. c. 75, s. 87, and s. 58 (4), (5), of Local Government Act, 1894.

CH. XII. .—(1) Any instrument which is required to be executed
 Execution of instruments by head of department. by the [Postmaster-General], or to which he is a party, may be executed by any of the [secretaries of the Post Office] in the name of the [Postmaster-General], and, if so executed, shall be deemed to have been executed by the [Postmaster-General], and shall have effect accordingly.

(2) Any instrument purporting to be executed by any of the [secretaries of the Post Office] in the name of the [Postmaster-General], shall, until the contrary is proved, be deemed to have been so executed without proof of the official character of the person appearing to have executed it.

See Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76, s. 15); Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30, s. 7); Board of Education Act, 1899 (62 & 63 Vict. c. 33, s. 7).

Evidence of register. . A register purporting to be kept in pursuance of this Act shall be deemed to be in the proper custody when in the custody of the registrar, and shall be of such a public nature as to be admissible in evidence for all matters entered therein on its mere production from that custody.

By 14 & 15 Vict. c. 99, s. 14, it is provided that whenever any book or document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, an examined copy or extract is admissible in evidence; also a copy or extract purporting to be certified to be a true copy or extract by the officer having custody of the original; the officer is required to furnish such certified copy or extract, and penalties are imposed for falsification and forgery.

Gazette to be evidence. . The notification in the London Gazette of any order made [by a Secretary of State] in pursuance of this Act, shall be evidence that the order was made and came into operation in manner provided by this Act.

This clause should be only applied to orders made by Government departments. The Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), amended by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), and the Documentary Evidence Act, 1895 (58 & 59 Vict. c. 9) provides for evidence of the contents of orders made by certain Government departments, but where subsequent conditions are required before the order comes into operation, e. g., the laying before Parliament or otherwise, it may sometimes be convenient to insert a clause making the production of some easily accessible document *prima facie* evidence of the performance of the conditions of the Act.

—(A.) A list or document, or an order made by a [local authority], may be proved by the production of a copy thereof, certified to be a true copy by a person purporting to be the clerk of the [local authority].

CA. XII.
—
Proof of document by certified copy, &c.

(B.) The following copies of any orders made in pursuance of this Act shall be received in evidence; that is to say:—

- (1) Any copy purporting to be printed by the King's printer of Acts of Parliament or by any other printer in pursuance of an authority given by the [authority under Act];
- (2) Any copy of an order certified to be a true copy by the [clerk] of the [authority], or by any other person appointed by the [authority] either in addition to or in exclusion of the [clerk] to certify such orders.

See Medical Act, 1886 (49 & 50 Vict. c. 48, s. 23). It is, strictly speaking, unnecessary to enact that copies purporting to be printed by the King's Printer shall be admissible in evidence. See 31 & 32 Vict. c. 37; 45 Vict. c. 9.

COMPUTATION OF TIME.

Forms.

. In computing time for the purposes of this Act, unless the contrary intention appears,—

Computation of time.

- (1) A period reckoned by days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
- (2) If the last day of the period is Sunday, Christmas Day, Good Friday, or a bank holiday (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
- (3) When any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it

CH. XII.

is done or taken on the next day afterwards, not being an excluded day ;

- (4) When any act or proceeding is directed or allowed to be done or taken within any time not exceeding seven days, excluded days shall not be reckoned in the computation of the time.

See 41 & 42 Vict. c. 74, s. 5, and 45 & 46 Vict. c. 50, s. 230; 56 & 57 Vict. c. 73, s. 73; 61 & 62 Vict. c. 41, s. 12. It must be borne in mind that the days observed in Scotland and Ireland as holidays differ from those observed in England. The general rule, apart from special enactment, is that Sundays are included in all computations of time, except when the time is limited to twenty-four hours, in which case the following day is allowed (Burn's *Justice*, Tit. Lord's Day).

The Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9), enacts that 'Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be mean Greenwich time, and in the case of Ireland, mean Dublin time.'

SAVING CLAUSES.

Preliminary Note.

Saving clauses are usually of a special character. Ss. 122-5 of the Local Government Act, 1888, indicate the kind of savings which are usually required when new local authorities are substituted for existing authorities.

Forms.

Saving
for rules
of equity
and
common
law.

. The rules of equity and of common law applicable to [partnership] shall continue in force except so far as they are inconsistent with the express provisions of this Act.

See s. 46 of the Partnership Act, 1890 (53 & 54 Vict. c. 39). This form of saving is specially appropriate to a codifying Act. For a similar form, see Bills of Exchange Act (45 & 46 Vict. c. 61, s. 97).

Powers of
Act cumu-
lative.

A.—All powers given by this Act shall be in addition to and not in derogation of any other powers conferred by Act of Parliament, law, or custom, and such other powers may be exercised in the same manner as if this Act had not passed.

See 38 & 39 Vict. c. 55, s. 341. For a general provision as to offences under two or more laws, see s. 33 of the Interpretation Act, 1889, in Appendix II below.

B.—Where this Act is put in force in any district in

which there is a local Act for the like purpose as this Act, CH. XII.
the enactments of the local Act so far as they relate to that Repeal of
local Acts.
purpose shall cease to be in operation.

See s. 14 of the Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72). It must be considered in each case whether the general Act is to be cumulative or whether local Acts are to be repealed. In some cases it may be expedient to take power to repeal local Acts by Provisional Order (see s. 103 of the Explosives Act, 1875 (38 & 39 Vict. c. 17)).

. Nothing in this Act shall be in derogation of any Saving for
powers of
[Charity
Commis-
sioners,
&c.]
power otherwise vested in [the Commissioners, &c.], and [the
Commissioners, &c.] may exercise for the purpose of this Act
all powers otherwise vested in them in relation to [charities, &c.]
&c.] respectively.

See 53 & 54 Vict. c. 70, s. 91, and 54 & 55 Vict. c. 76, s. 138.

. If the court before whom a person is charged with Saving for
power to
proceed
under
other law.
an offence punishable by virtue of this Act thinks that
proceedings ought to be taken against him for the offence
under any other Act, or otherwise, the court may adjourn the
case to enable such proceedings to be taken.

The object of this clause is to prevent collusive proceedings being taken for the minor offence.

. A proceeding or conviction for any act declared by this Saving of
civil
remedy.
Act to be a misdemeanour [punishable under this Act] shall
not affect any civil remedy to which any person aggrieved by
the act may be entitled.

See 38 & 39 Vict. c. 87, s. 102; 52 & 53 Vict. c. 21, s. 33.

. Nothing in this Act shall entitle any person to refuse Saving of
obligation
to make
discover y
to make a complete discovery or to answer any question or
interrogatory in any civil proceeding, but no such discovery
or answer shall be admissible in evidence against that person
in any criminal proceeding under this Act.

See 38 & 39 Vict. c. 87, s. 103.

SPECIAL AUTHORITIES.

Preliminary Note.

It is sometimes necessary to create by statute a special authority. The authority may be either a permanent commission with judicial powers,

CH. XII. such as the Railway and Canal Commission (51 & 52 Vict. c. 25), or a temporary commission with judicial powers, such as the Belfast Commission (50 Vict. c. 4), the Commission to inquire into the Metropolitan Board of Works (51 Vict. c. 6) or the Parnell Commission (51 & 52 Vict. c. 35), or a body having power to frame schemes or make statutes, such as the Commissioners for the Universities of Oxford, Cambridge, and London (40 & 41 Vict. c. 48 ; 61 & 62 Vict. c. 62), the Public School Commissioners (31 & 32 Vict. c. 118), or the various Boundary Commissioners (*see*, e. g., 50 & 51 Vict. c. 61), or a consultative committee, such as that appointed under the Merchant Shipping (Life Saving Appliances) Act, 1888 (51 & 52 Vict. c. 24), or an administrative body, such as the Inspection Committee appointed under the Savings Banks Act, 1891 (54 & 55 Vict. c. 21), or a board constituted wholly or partly by a popular election, such as the boards of conservators established under the Salmon and Freshwater Fisheries Acts.

The powers given to the authority will vary according to the circumstances of the case.

It will ordinarily be necessary to provide a staff and funds, to determine the appointments or elections, qualifications, disqualifications, tenure of office, and remuneration (if any) of members of the authority, to fix or give powers of fixing the quorum, to regulate or give powers of regulating the procedure, to provide for filling vacancies, and to guard against invalidation of proceedings by reason of any accidental absence or omission to fill a vacancy.

It is hardly necessary to say that a new authority should not be created where the work can be done by any existing authority, or by a joint committee of two or more existing authorities.

Forms.

Whereas a Commission has been issued by His Majesty, whereby

(hereinafter referred to as the Commissioners), have been authorized and directed to inquire into and report upon

And whereas powers for the effectual conducting of this inquiry cannot be conferred without the authority of Parliament:

Be it therefore enacted, &c. :

Powers of Commissioners (judicial). 1.—(1) The Commissioners shall have all such powers, rights, and privileges as are vested in the High Court, or in any judge thereof, on the occasion of any action, in respect of the following matters:—

- (i) the enforcing the attendance of witnesses and examining CH. XII.
 them on oath, affirmation, or otherwise ;
 (ii) the compelling the production of documents ; and
 (iii) the punishing persons guilty of contempt ;

and a summons signed by one or more of the Commissioners may be substituted for, and shall be equivalent to, any formal process capable of being issued in any action for enforcing the attendance of witnesses or compelling the production of documents.

(2) A warrant of committal to prison issued for the purpose of enforcing the powers conferred by this section shall be signed by one or more of the Commissioners, and shall specify the prison to which the offender is to be committed, and shall not authorize the imprisonment of an offender for a period exceeding three months.

2. Every person who on examination on oath or affirmation before the Commissioners wilfully gives false evidence shall be liable to the penalties for perjury. Penalty for false swearing.

3. The _____, and any persons who may be so authorized by the Commissioners, may appear before the Commissioners by counsel or solicitor. Power to appear by counsel.

4.—(1) Every person examined as a witness in an inquiry before the Commissioners who, in the opinion of the Commissioners, makes a full and true disclosure touching all the matters in respect of which he is examined, shall be entitled to receive a certificate signed by the Commissioners stating that the witness has, on his examination, made a full and true disclosure as aforesaid. Indemnity to witnesses.

(2) If any civil or criminal proceeding is at any time thereafter instituted against any such witness in respect of any matter touching which he has been so examined, the court having cognizance of the case shall, on proof of the certificate, stay the proceeding, and may in their discretion award to the witness such costs as he may be put to in or by reason of the proceeding.

(3) Provided that no evidence taken under this Act shall

CH. XII. be admissible against any person in any civil or criminal proceeding, except in the case of a witness accused of having given false evidence before the Commissioners, or any of them.

The preceding four clauses are taken from the Metropolitan Board (Commission) Act, 1888 (51 Vict. c. 6). In that case a Royal Commission had been appointed, and had to be given some of the coercive powers of a court of law. A Royal Commission has no power to require the attendance of witnesses or the production of documents.

APPENDIX I

REPEAL TABLES AND SCHEDULES

PART I.

COMPARISON OF ENACTMENTS REPEALED WITH BILL¹.

| <i>Enactments repealed.</i> | <i>Subject-matter.</i> | <i>Remarks.</i> |
|-----------------------------|------------------------|---|
| 20 & 21 Vict. c. 201, s. 1 | Short title . . . | Omitted as unnecessary. |
| " " s. 2 | Definitions . . . | Reproduced by cl. 28. |
| " " s. 3 | [] | Virtually repealed by 56 & 57 Vict. c. 42, s. 3. |

The following enactments, though relating to the subject-matter of the Bill, have been left outstanding on the ground either that they cannot be conveniently detached from their context or that they can be more appropriately reproduced in another Bill.

TABLE.

| <i>Enactments.</i> | <i>Reasons for Omission from Consolidation Bill.</i> |
|--------------------|--|
| | |

PART II.

ENACTMENTS REPEALED².

| <i>Session and Chapter.</i> | <i>Title or Short Title.</i> | <i>Extent of Repeal.</i> |
|-----------------------------|------------------------------|--------------------------|
| | | |

¹ This table is useful in the case of a Consolidation Bill, but of course is printed as a memorandum and not as part of the Bill.

² See s. 35 of the Interpretation Act, 1889, in Appendix II.

APPENDIX II

INTERPRETATION ACT, 1889

(52 & 53 Vict. c. 63).

An Act for consolidating enactments relating to the Construction of Acts of Parliament and for further shortening the Language used in Acts of Parliament.

[August 30, 1889.]

The Interpretation Act, 1889, may be described as a Draftsman's Act. It supplies a kind of legislative dictionary, and its object is (1) to shorten the language of statutory enactments; (2) to provide as far as possible for uniformity of expressions by giving *prima facie* definitions of several terms in common use; (3) to state explicitly certain convenient rules of construction; and (4) to guard against accidental omissions by importing into Acts certain common form provisions, which would otherwise have to be inserted expressly, and which might be overlooked.

The Act supersedes and repeals Brougham's Act (13 & 14 Vict. c. 21), and adds several new provisions, some of which were suggested by the Indian General Clauses Act of 1887. In framing the Act it was thought desirable to group separately the provisions re-enacted from Brougham's Act, and those enacted for the first time in 1889.

Acts of a similar character have been passed for British India, and for several of the British Colonies.

References to the Queen will of course now be construed, where necessary, as references to the King.

Re-enactment of existing Rules.

Rules as
to gender
and
number.

1.—(1) In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, unless the contrary intention appears,—

- (a) words importing the masculine gender shall include females; and
- (b) words in the singular shall include the plural, and words in the plural shall include the singular.

(2) The same rules shall be observed in the construction of every enactment relating to an offence punishable on indictment or on summary conviction, when the enactment is contained in an Act passed in or before the year one thousand eight hundred and fifty. APP. II.

Sub-section (1) merely re-enacts a portion of s. 3 of Brougham's Act (13 & 14 Vict. c. 21). That Act was passed on June 10, 1850, and was expressed to commence and take effect from and immediately after the commencement of the then next session of Parliament. As to the effect of (1) (a) on the electoral rights of women, see *Charlton v. Ling* (1868), L. R. 4 C. P. 374, and *Beresford-Hope v. Lady Sandhurst* (1889), 23 Q. B. D. 79.

Sub-section (2) re-enacts provisions contained in an English Act of 1827 (7 & 8 Geo. IV. c. 28, s. 14) and an Irish Act of 1828 (9 Geo. IV. c. 54, s. 35).

2.—(1) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate. Applica-
tion of
penal
Acts to
bodies
corporate.

(2) Where under any Act, whether passed before or after the commencement of this Act, any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.

This section re-enacts provisions contained in the Acts of 1827 and 1828 referred to above. It will be remembered that the definition of 'person' in s. 19 is not retrospective. For a case where the word 'person' was held not to include a corporation, see *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas., 857.

3. In every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely,—

The expression 'month' shall mean calendar month :

The expression 'land' shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure :

The expression 'oath' and 'affidavit' shall, in the case of persons for the time being allowed by law to affirm or

APP. II.

declare instead of swearing, include affirmation and declaration, and the expression 'swear' shall, in the like case, include affirm and declare.

This section re-enacts the general definitions in Brougham's Act, with the exception of the definition of 'county,' which is dealt with by s. 4. The definition of 'land' involves repetitions and is not satisfactory, but it had to be retained for past Acts and it was not found very easy to improve for future Acts. Verbal corrections were made by the Act of 1889 in the definitions of 'oath' and 'affidavit.' These definitions do not seem to include a statutory declaration (*see* s. 21), which may be made by any person, without reference to his religious belief.

Meaning
of
'county'
in past
Acts.

4. In every Act passed after the year one thousand eight hundred and fifty and before the commencement of this Act the expression 'county' shall, unless the contrary intention appears, be construed as including a county of a city and a county of a town.

This section re-enacts a provision of Brougham's Act which must be retained for past Acts, but the application of which to future Acts is materially modified by the provisions of the Local Government Act, 1888.

Meaning
of
'parish.'

5. In every Act passed after the year one thousand eight hundred and sixty-six, whether before or after the commencement of this Act, the expression 'parish' shall, unless the contrary intention appears, mean, as respects England and Wales, a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed.

This section re-enacts a provision contained in s. 18 of the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113).

Meaning
of
'county
court.'

6. In this Act, and in every Act and Order of Council passed or made after the year one thousand eight hundred and forty-six, whether before or after the commencement of this Act, the expression 'county court' shall, unless the contrary intention appears, mean, as respects England and Wales, a court under the County Courts Act, 1888.

51 & 52
Vict. c. 43.

This section re-enacts a provision in the County Courts Act, 1888 (51 & 52 Vict. c. 43, s. 187), which was itself re-enacted from the County Courts Act of 1846.

7. In every Act relating to Scotland, whether passed before or after the commencement of this Act, unless the contrary intention appears—

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The expression 'sheriff clerk' shall include steward clerk ;
 The expressions 'shire,' 'sheriffdom,' and 'county' shall include any stewardry in Scotland.

Meaning of 'sheriff clerk,' &c. in Scotch Acts.

This section re-enacts a provision of a Scotch Act of 1837 (7 Will IV and 1 Vict. c. 39).

8. Every section of an Act shall have effect as a substantive enactment without introductory words.

Sections to be substantive enactments.

This section is re-enacted from Brougham's Act.

9. Every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, shall be a public Act, and shall be judicially noticed as such, unless the contrary is expressly provided by the Act.

Acts to be public Acts.

This section is re-enacted from Brougham's Act. See above, pp. 27, 28.

10. Any Act may be altered, amended, or repealed in the same session of Parliament.

Amendment or repeal of Acts in same session.

This section is re-enacted from Brougham's Act.

11.—(1) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment.

Effect of repeal in Acts passed since 1850.

(2) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into operation.

This section is re-enacted from Brougham's Act. As to the effect of repeals in later Acts, see s. 38.

New General Rules of Construction.

12. In this Act, and in every other Act whether passed before or after the commencement of this Act, the following

Official definitions in

APP. II.
—
past and
future
Acts.

expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression 'the Lord Chancellor' shall, except when used with reference to Ireland only, mean the Lord High Chancellor of Great Britain for the time being, and when used with reference to Ireland only, shall mean the Lord Chancellor of Ireland for the time being.

Under 5 Eliz. c. 18 the Lord Keeper of the Great Seal is the same authority as the Lord Chancellor.

(2) The expression 'the Treasury' shall mean the Lord High Treasurer for the time being or the Commissioners for the time being of Her Majesty's Treasury.

Documents required by statute or otherwise to be signed by the Commissioners of the Treasury, may be signed by any two or more of them (12 & 13 Vict. c. 89).

(3) The expression 'Secretary of State' shall mean one of Her Majesty's Principal Secretaries of State for the time being.

(4) The expression 'the Admiralty' shall mean the Lord High Admiral of the United Kingdom for the time being, or the Commissioners for the time being for executing the office of Lord High Admiral of the United Kingdom.

(5) The expression 'the Privy Council' shall, except when used with reference to Ireland only, mean the Lords and others for the time being of Her Majesty's Most Honourable Privy Council, and when used with reference to Ireland only shall mean the Privy Council of Ireland for the time being.

(6) The expression 'the Education Department' shall mean the Lords of the Committee for the time being of the Privy Council appointed for Education.

The Education Department is now superseded by the Board of Education under 62 & 63 Vict. c. 33, s. 1.

(7) The expression 'the Scotch Education Department' shall mean the Lords of the Committee for the time being of the Privy Council appointed for Education in Scotland.

(8) The expression 'the Board of Trade' shall mean the

Lords of the Committee for the time being of the Privy Council appointed for the consideration of matters relating to trade and foreign plantations.

(9) The expression 'Lord Lieutenant,' when used with reference to Ireland, shall mean the Lord Lieutenant of Ireland or other Chief Governors or Governor of Ireland for the time being.

The officer popularly known in England as 'lord lieutenant' is properly designated 'lieutenant' of a county (*see* 45 & 46 Vict. c. 49, s. 29).

(10) The expression 'Chief Secretary,' when used with reference to Ireland, shall mean the Chief Secretary to the Lord Lieutenant for the time being.

(11) The expression 'Postmaster-General' shall mean Her Majesty's Postmaster-General for the time being.

(12) The expression 'Commissioners of Woods' or 'Commissioners of Woods and Forests' shall mean the Commissioners of Her Majesty's Woods, Forests, and Land Revenues for the time being.

The Commissioners were first appointed under 50 Geo. III. c. 65, and continued under the now operative Act, 10 Geo. IV. c. 50. By 2 & 3 Will. IV. c. 1, they were reconstituted as the Commissioners of His Majesty's Woods, Forests, Land Revenues, Works, and Buildings, and took over the duties previously performed by the Surveyor-General of His Majesty's Works and Public Buildings. By 14 & 15 Vict. c. 42 the Commissioners of Works and Public Buildings were constituted, and the earlier division of powers was, except in some particulars, restored.

(13) The expression 'Commissioners of Works' shall mean the Commissioners of Her Majesty's Works and Public Buildings for the time being.

(14) The expression 'Charity Commissioners' shall mean the Charity Commissioners for England and Wales for the time being.

(15) The expression 'Ecclesiastical Commissioners' shall mean the Ecclesiastical Commissioners for England for the time being.

(16) The expression 'Queen Anne's Bounty' shall mean the Governors of the Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy.

APP. II.

(17) The expression 'National Debt Commissioners' shall mean the Commissioners for the time being for the Reduction of the National Debt.

(18) The expression 'the Bank of England' shall mean, as circumstances require, the Governor and Company of the Bank of England or the bank of the Governor and Company of the Bank of England.

(19) The expression 'the Bank of Ireland' shall mean, as circumstances require, the Governor and Company of the Bank of Ireland, or the bank of the Governor and Company of the Bank of Ireland.

(20) The expression 'consular officer' shall include consul-general, consul, vice-consul, consular agent, and any person for the time authorized to discharge the duties of consul-general, consul, or vice-consul.

A somewhat wider definition of 'consular officer' is contained in s. 3 of the Consular Salaries and Fees Act, 1891 (54 & 55 Vict. c. 36).

It will be observed that the definitions in this section are retrospective as well as prospective.

Judicial
definitions in
past and
future
Acts.

13. In this Act and in every other Act, whether passed before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression 'Supreme Court,' when used with reference to England or Ireland, shall mean the Supreme Court of Judicature in England or Ireland, as the case may be, or either branch thereof.

(2) The expression 'Court of Appeal,' when used with reference to England or Ireland, shall mean Her Majesty's Court of Appeal in England or Ireland, as the case may be.

(3) The expression 'High Court,' when used with reference to England or Ireland, shall mean Her Majesty's High Court of Justice in England or Ireland, as the case may be.

(4) The expression 'court of assize' shall, as respects England, Wales, and Ireland, mean a court of assize, a court of oyer and terminer, and a court of gaol delivery, or any of

them, and shall, as respects England and Wales, include the Central Criminal Court. APP. II.

(5) The expression 'assizes,' as respects England, Wales, and Ireland, shall mean the courts of assize usually held in every year, and shall include the sessions of the Central Criminal Court, but shall not include any court of assize held by virtue of any special commission, or, as respects Ireland, any court held by virtue of the powers conferred by section sixty-three of the Supreme Court of Judicature Act (Ireland), 1877. 40 & 41
Vict. c. 57.

(6) The expression 'the Summary Jurisdiction Act, 1848,' shall mean the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled, 'An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders.'

(7) The expression 'the Summary Jurisdiction (England) Acts' and the expression 'the Summary Jurisdiction (English) Acts' shall respectively mean the Summary Jurisdiction Act, 1848, and the Summary Jurisdiction Act, 1879, and any Act, past or future, amending those Acts or either of them. 11 & 12
Vict. c. 43.
42 & 43
Vict. c. 49.

(8) The expression 'the Summary Jurisdiction (Scotland) Acts' shall mean the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and any Act, past or future, amending those Acts or either of them. 27 & 28
Vict. c. 53.
44 & 45
Vict. c. 33.

(9) The expression 'the Summary Jurisdiction (Ireland) Acts' shall mean, as respects the Dublin Metropolitan Police District, the Acts regulating the powers and duties of justices of the peace or of the police of that district, and as respects any other part of Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act, past or future, amending the same. 14 & 15
Vict. c. 93.

(10) The expression 'the Summary Jurisdiction Acts' when used in relation to England or Wales shall mean the Summary Jurisdiction (England) Acts, and when used in relation to Scotland the Summary Jurisdiction (Scotland) Acts, and

APP. II. when used in relation to Ireland the Summary Jurisdiction (Ireland) Acts.

(11) The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law.

Justices at a licensing meeting are not a court of summary jurisdiction, *Boulter v. Kent Justices* [1897], A. C. 556. The definition of 'court of summary jurisdiction' for Scotland was struck out during the passage of the Bill through the House of Lords, and consequently it is sometimes necessary to insert a special definition in enactments relating to Scotland. The form of definition commonly in use is—

'The expression "court of summary jurisdiction" means the sheriff or any justice or justices of the peace, or any magistrate or magistrates, by whatever name called, having jurisdiction or authorized to act under the Summary Jurisdiction (Scotland) Acts.'

Under s. 28 of the Interpretation Act, "sheriff" includes sheriff substitute.

(12) The expression 'petty sessional court' shall, as respects England or Wales, mean a court of summary jurisdiction consisting of two or more justices when sitting in a petty sessional court-house, and shall include the Lord Mayor of the city of London, and any alderman of that city, and any metropolitan or borough police magistrate or other stipendiary magistrate when sitting in a court-house or place at which he is authorized by law to do alone any act authorized to be done by more than one justice of the peace.

(13) The expression 'petty sessional court-house' shall, as respects England or Wales, mean a court-house or other place at which justices are accustomed to assemble for holding special or petty sessions, or which is for the time being appointed as a substitute for such a court-house or place, and where the justices are accustomed to assemble for either special or petty sessions at more than one court-house or place in a petty sessional division, shall mean any such court-house

or place. The expression shall also include any court-house or place at which the Lord Mayor of the city of London or any alderman of that city, or any metropolitan or borough police magistrate or other stipendiary magistrate is authorized by law to do alone any act authorized to be done by more than one justice of the peace.

(14) The expression 'court of quarter sessions' shall mean the justices of any county, riding, parts, division, or liberty of a county, or of any county of a city, or county of a town, in general or quarter sessions assembled, and shall include the court of the recorder of a municipal borough having a separate court of quarter sessions.

14. In every Act passed after the commencement of this Act, unless the contrary intention appears, the expression 'rules of court' when used in relation to any court shall mean rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of such court, and as regards Scotland shall include acts of adjournal and acts of sederunt.

Meaning of 'rules of court.'

The power of the said authority to make rules of court as above defined shall include a power to make rules of court for the purpose of any Act passed after the commencement of this Act, and directing or authorizing anything to be done by rules of court.

This section is not retrospective.

15. In this Act and in every Act passed after the commencement of this Act the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

Meaning of borough.

(1) The expression 'municipal borough' shall mean, as respects England and Wales, any place for the time being subject to the Municipal Corporations Act, 1882, and any reference to the mayor, aldermen, and burgesses of a borough shall include a reference to the mayor, aldermen, and citizens of a city, and any reference to the powers, duties, liabilities

45 & 46
Vict. c. 50.

APP. II. or property of the council of a borough shall be construed as a reference to the powers, duties, liabilities, or property of the mayor, aldermen, and burgesses of the borough acting by the council.

(2) The expression 'municipal borough' shall mean, as respects Ireland, any place for the time being subject to the Act of the session of the third and fourth years of the reign of Her present Majesty, chapter one hundred and eight, intituled 'An Act for the regulation of municipal corporations in Ireland.'

(3) The expression 'parliamentary borough' shall mean any borough, burgh, place or combination of places returning a member or members to serve in Parliament, and not being either a county or division of a county, or a university, or a combination of universities.

(4) The expression 'borough' when used in relation to local government shall mean a municipal borough as above defined, and when used in relation to parliamentary elections or the registration of parliamentary electors shall mean a parliamentary borough as above defined.

This section is not retrospective. The definition of borough will sometimes require consideration with reference to the metropolitan boroughs under the London Government Act, 1899, which are not places subject to the provisions of the Municipal Corporations Act, 1882.

Meaning
of guar-
dians and
union.

16. In this Act and in every Act passed after the commencement of this Act the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression 'board of guardians' shall, as respects England and Wales, mean a board of guardians elected under the Poor Law Amendment Act, 1834, and the Acts amending the same, and shall include a board of guardians or other body of persons performing under any local Act the like functions to a board of guardians under the Poor Law Amendment Act, 1834.

(2) The expression 'poor law union' shall, as respects

4 & 5
Will. IV.
c. 76.

England and Wales, mean any parish or union of parishes for which there is a separate board of guardians. APP. II.

(3) The expression 'board of guardians' shall, as respects Ireland, mean a board of guardians elected under the Act of the session of the first and second years of the reign of Her present Majesty, chapter fifty-six, intituled 'An Act for the more effectual relief of the destitute poor in Ireland,' and the Acts amending the same, and shall include any body of persons appointed by the Local Government Board for Ireland to carry into execution the provisions of those Acts.

(4) The expression 'poor law union' shall, as respects Ireland, mean any townland or place or union, or townlands or places, for which there is a separate board of guardians.

This section is not retrospective.

17. In every Act passed after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

Definitions relating to elections.

(1) The expression 'parliamentary election' shall mean the election of a member or members to serve in Parliament for a county or division of a county, or parliamentary borough or division of a parliamentary borough, or for a university or combination of universities.

(2) The expression 'parliamentary register of electors' shall mean a register of persons entitled to vote at any parliamentary election.

(3) The expression 'local government register of electors' shall mean as respects an administrative county in England or Wales other than a county borough, the county register, and as respects a county borough or other municipal borough, the burges roll.

This section is not retrospective. It must be borne in mind that the register under sub-section (3) does not include parochial electors.

18. In this Act, and in every Act passed after the commencement of this Act, the following expressions shall, Geographical and

APP. II.
 colonial
 defini-
 tions in
 future
 Acts.

unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely :—

(1) The expression 'British Islands' shall mean the United Kingdom, the Channel Islands, and the Isle of Man.

(2) The expression 'British possession' shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.

(3) The expression 'colony' shall mean any part of Her Majesty's dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.

(4) The expression 'British India' shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any governor or other officer subordinate to the Governor-General of India.

(5) The expression 'India' shall mean British India together with any territories of any native prince or chief under the suzerainty of Her Majesty exercised through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General of India.

(6) The expression 'Governor' shall, as respects Canada and India, mean the Governor-General, and include any person who for the time being has the powers of the Governor-General, and as respects any other British possession, shall include the officer for the time being administering the government of that possession.

(7) The expression 'colonial legislature' and the expression 'legislature,' when used with reference to a British possession, shall respectively mean the authority, other than the Imperial

Parliament or Her Majesty the Queen in Council, competent **APP. II.**
to make laws for a British possession.

This section is not retrospective. It is framed on the view that when powers are conferred on the legislature of a British possession having both a central legislature and a local legislature, or on the Government of a British possession having both a Governor-General and subordinate governors, as in the case of India, Canada, or Australia, the powers are usually intended to be exercised by the central legislature or by the Governor-General. Where it is intended to confer by Act of Parliament power on a local legislature, or on a subordinate governor, special provision must be made in the Act. (*See, e. g., 55 & 56 Vict. c. 6, s. 4.*)

19. In this Act and in every Act passed after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate. Meaning of 'person' in future Acts.

This section is not retrospective. *See note on s. 2 above.*

20. In this Act and in every other Act whether passed before or after the commencement of this Act, expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form. Meaning of 'writing' in past and future Acts.

This section is retrospective.

21. In this Act, and in every other Act, whether passed before or after the commencement of this Act, the expression 'statutory declaration' shall, unless the contrary intention appears, mean a declaration made by virtue of the Statutory Declarations Act, 1835. Meaning of 'statutory declaration' in past and future Acts.

This section is retrospective.

22. In this Act and in every Act passed after the commencement of this Act, the expression 'financial year' shall, unless the contrary intention appears, mean as respects any matters relating to the Consolidated Fund or moneys provided by Parliament, or to the Exchequer, or to Imperial taxes or finance, the twelve months ending the thirty-first day of March. Meaning of 'financial year' in future Acts.

This section is not retrospective. By s. 73 of the Local Government

APP. II. Act, 1888 (51 & 52 Vict. c. 41), the year ending the thirty-first day of March is made the 'local financial year' for the accounts of local authorities.

Definition of Lands Clauses Acts. 23. In any Act passed after the commencement of this Act, unless the contrary intention appears,—

The expression 'Lands Clauses Acts' shall mean—

8 & 9 Vict. c. 18.
23 & 24 Vict. c. 106.
32 & 33 Vict. c. 18.
46 & 47 Vict. c. 15. (a) as respects England and Wales, the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, the Lands Clauses Consolidation Act, 1869, and the Lands Clauses (Umpire) Act, 1883, and any Acts for the time being in force amending the same; and

8 & 9 Vict. c. 19.
23 & 24 Vict. c. 106. (b) as respects Scotland, the Lands Clauses Consolidation (Scotland) Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, and any Acts for the time being in force amending the same; and

8 & 9 Vict. c. 18.
23 & 24 Vict. c. 97.
14 & 15 Vict. c. 70.
27 & 28 Vict. c. 71.
31 & 32 Vict. c. 70. (c) as respects Ireland, the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, the Railways Act (Ireland), 1851, the Railways Act (Ireland), 1860, the Railways Act (Ireland), 1864, and the Railways Traverse Act, and any Acts for the time being in force amending the same.

This section is not retrospective.

Meaning of Irish Valuation Acts. 24. In any Act passed before or after the commencement of this Act, the expression 'Irish Valuation Acts' shall mean the Acts relating to the valuation of rateable property in Ireland.

This section is retrospective.

Meaning of 'Ordnance map.' 25. In this Act and in every other Act, whether passed before or after the commencement of this Act, the expression 'ordnance map' shall, unless the contrary intention appears, mean a map made under the powers conferred by the Survey (Great Britain) Acts, 1841 to 1870, or by the Survey

(Ireland) Acts, 1825 to 1870, and the Acts amending the same respectively. APP. II.

This section is retrospective.

26. Where an Act passed after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

This section in effect generalizes a provision as to service by post which is to be found in Table A of the Companies Act, 1862, in s. 85 of the Explosive Substances Act, 1875 (38 & 39 Vict. c. 17), and in other Acts. The section is not retrospective.

27. In every Act passed after the commencement of this Act, the expression 'committed for trial,' used in relation to any person shall, unless the contrary intention appears, mean, as respects England and Wales, committed to prison with the view of being tried before a judge and jury, whether the person is committed in pursuance of section twenty-two or of section twenty-five of the Indictable Offences Act, 1848, or is committed by a court, judge, coroner, or other authority having power to commit a person to any prison with a view to his trial, and shall include a person who is admitted to bail upon a recognizance to appear and take his trial before a judge and jury.

This section is not retrospective.

28. In this Act and in every Act passed after the commencement of this Act, unless the contrary intention appears—

The expression 'sheriff' shall, as respects Scotland, include a sheriff substitute;

The expression 'felony' shall, as respects Scotland, mean a high crime and offence;

Meaning of service by post.

Meaning of 'committed for trial.'

11 & 12 Vict. c. 42.

Meanings of 'sheriff,' 'felony,' and 'misdemeanour' in future Scotch Acts.

APP. II. The expression 'misdemeanour' shall, as respects Scotland, mean an offence.

This section is not retrospective.

Meaning of 'county court' in future Irish Acts. 40 & 41 Vict. c. 56.

29. In every Act passed after the commencement of this Act, unless the contrary intention appears, the expression 'county court' shall, as respects Ireland, mean a civil bill court within the meaning of the County Officers and Courts (Ireland) Act, 1877.

This section is not retrospective.

References to the Crown.

30. In this Act, and in every other Act, whether passed before or after the commencement of this Act, references to the Sovereign reigning at the time of the passing of the Act or to the Crown shall, unless the contrary intention appears, be construed as references to the Sovereign for the time being, and this Act shall be binding on the Crown.

The declaration made by this section as to the effect of references to the Crown merely states what is probably the effect of existing enactments, but the occasional reference to 'Her Majesty, her heirs and successors,' seems to show that the point had not been considered free from doubt.

Construction of statutory rules, &c.

31. Where any Act, whether passed before or after the commencement of this Act, confers power to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or by-laws, expressions used in the instrument, if it is made after the commencement of this Act, shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power.

This section obviates the necessity for special definition clauses in many sets of statutory rules. It does not apply to rules made before January 1, 1890, but it does apply to rules made after that date under Acts passed before that date. In framing rules under an Act it is considered desirable to state expressly that the Interpretation Act does apply.

Construction of provisions as to exer-

32.—(1) Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and

the duty shall be performed from time to time as occasion requires. APP. II.

The effect of this sub-section is to make the insertion of the words 'from time to time' usually unnecessary. Those words were formerly inserted for the purpose of removing the application of the doctrine that a statutory power is exhausted by its first exercise unless its repetition is expressly authorized. The presumption on this point is now reversed. If it is intended that a statutory power should not be exercised recurrently this should be stated.

cise of
powers
and duties.

(2) Where an Act passed after the commencement of this Act confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office.

This sub-section obviates the necessity for using the expression 'for the time being' in many cases.

(3) Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or by-laws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or by-laws.

The effect of this sub-section is, that where a power is given to make rules, it is unnecessary to add an express power to alter, revoke, vary, or add to the rules when made. It will be observed that the sub-section does not apply to orders, such as Orders in Council, or to documents, such as warrants.

33. Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence. Provisions
as to
offences
under two
or more
laws.

This section generalizes a provision which had been of frequent occurrence in modern general Acts of Parliament.

APP. II.
Measurement of distances. 34. In the measurement of any distance for the purposes of any Act passed after the commencement of this Act, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

The rule embodied in this section is probably the most convenient rule of measurement in the majority of cases. Where the intention is that a distance should be measured by the nearest practicable road, special words should be used (*see, e. g., 33 & 34 Vict. c. 75, s. 74*).

Citation of Acts. 35.—(1) In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or the session, as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the section or sub-section of the Act in which the enactment is contained.

This sub-section re-enacts part of s. 3 of Brougham's Act in a shorter form.

(2) Where any Act passed after the commencement of this Act contains such reference as aforesaid, the reference shall, unless a contrary intention appears, be read as referring, in the case of statutes included in any revised edition of the statutes purporting to be printed by authority, to that edition, and in the case of statutes not so included, and passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission; and in other cases to the copies of the statutes purporting to be printed by the Queen's Printer, or under the superintendence or authority of Her Majesty's Stationery Office.

This sub-section reproduces another part of s. 3 of Brougham's Act with the necessary modernizations. The proviso to s. 3 of Brougham's Act had not been observed, and was not reproduced by the Interpretation Act.

(3) In any Act passed after the commencement of this Act a description or citation of a portion of another Act shall,

unless the contrary intention appears, be construed as including the word, section, or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation. APP. II.

This sub-section reproduces a direction which had been inserted in modern repealing schedules.

36.—(1) In this Act, and in every Act passed either before or after the commencement of this Act, the expression ‘commencement,’ when used with reference to an Act, shall mean the time at which the Act comes into operation. ‘Commencement.’

This sub-section generalizes a provision which, before the passing of the Act of 1889, it had been found necessary to insert in almost every Act.

(2) Where an Act passed after the commencement of this Act, or any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or by-laws made, granted, or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

This sub-section probably does no more than affirm the existing rule. But the use of the expression ‘On and after the commencement of this Act,’ and the fact that some Acts were expressed to commence, say, on January 1 whilst others were expressed to commence from and immediately after December 31, seemed to show that doubts might be entertained as to the precise moment at which an Act comes into operation.

37. Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or by-laws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement Exercise of statutory powers between passing and commencement of Act.

APP. II. thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.

This section re-enacts in a general form a provision which it had been constantly found necessary to insert in modern Acts.

Effect of
repeal in
future
Acts.

38.—(1) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

This sub-section does not apply to references in documents other than Acts.

(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or
- (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or
- (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or
- (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty,

forfeiture, or punishment may be imposed, as if the repealing App. II.
Act had not passed.

This section generalizes provisions which had become almost common forms in recent Acts. The common law rule was that a statute is not, in the absence of express words, to be construed retrospectively, but an alteration of procedure did not fall within this rule. See *Republic of Costa Rica v. Erlanger* (1873), L. R., 3 Ch. D. 69; *Heston and Isleworth Urban Council v. Grant* (1897), L. R., 2 Ch. D. 306; *Young v. Adams A. C.* [1898] 469. Special provisions as to the effect of repeal will still be required in particular cases. As to the effect of the savings embodied in this section see *In re the Tithe Act, 1891*, *Roberts v. Potts* L. R. [1894], 1 Q. B. D. 213.

APPENDIX III

RULES PUBLICATION ACT, 1893

(56 & 57 Vict. c. 66.)

An Act for the publication of Statutory Rules.

[21st December, 1893.]

The object of the Rules Publication Act, 1893, is twofold—(1) to supply facilities for criticizing the drafts of rules proposed to be made under statutory authority, and (2) to improve the provisions for the publication of such rules when made.

Section 1 gives effect to the first of these objects by providing machinery similar to that usually applied to the making of by-laws (*see, e. g., ss. 18a to 18e of the Public Health Act, 1875, 38 & 39 Vict. c. 55*); but its application is limited. It applies to statutory rules (as defined by s. 4) made in pursuance of any Act of Parliament which directs the statutory rules to be laid before Parliament. But it does not apply to statutory rules if the rules or the draft thereof are or is required to be laid before Parliament for any period before the rules come into operation. In this case the laying before Parliament is supposed to supply a sufficient opportunity for criticism. Certain departmental rules are also expressly excluded from the operation of the section. And the section is declared not to apply to Scotland.

Section 2 enables rules to be issued at once in cases of urgency without going through the probationary period required by s. 1. But these rules are to be provisional only, and are to be superseded by rules made in accordance with the ordinary machinery.

The object of s. 3 is to improve the system of publishing statutory rules, which, before the passing of this Act, were not always easy to find. The statutory rules and orders of each year are now published annually in volumes corresponding in size and character to the annual volumes of statutes. This arrangement was begun in 1890. The statutory rules and orders previous to 1890 are arranged in alphabetical order in a set of eight volumes, corresponding to the second edition of the Revised Statutes. An Index to the statutory rules and orders was published for the first time in 1893, and is revised from time to time. Separate copies of statutory rules and orders may be obtained on application to the King's Printers.

1.—(1) At least forty days before making any statutory rules to which this section applies, notice of the proposal to make the rules, and of the place where copies of the draft rules may be obtained, shall be published in the London Gazette.

APP. III.
—
Notice of and representation respecting certain draft rules.

(2) During those forty days any public body may obtain copies of such draft rules on payment of not exceeding three-pence per folio, and any representations or suggestions made in writing by a public body interested to the authority proposing to make the rules shall be taken into consideration by that authority before finally settling the rules; and on the expiration of those forty days the rules may be made by the rule-making authority, either as originally drawn or as amended by such authority, and shall come into operation forthwith or at such time as may be prescribed in the rules.

(3) Any enactment which provides that any statutory rules to which this section applies shall not come into operation for a specified period after they are made is hereby repealed, but this repeal shall not affect section thirty-seven of the Interpretation Act, 1889.

52 & 53
Vict. c. 63.

(4) The statutory rules to which this section applies are those made in pursuance of any Act of Parliament which directs the statutory rules to be laid before Parliament, but do not include any statutory rules if the same or a draft thereof are required to be laid before Parliament for any period before the rules come into operation, nor do they include rules made by the Local Government Board for England or Ireland, the Board of Trade, or the Revenue Departments, or by or for the purpose of the Post Office; nor rules made by the Board of Agriculture under the Contagious Diseases (Animals) Act, 1878, and the Acts amending the same.

41 & 42
Vict. c. 74.
55 & 56
Vict. c. 47.

(5) This section shall not apply to Scotland.

(6) In the case of any rules which it is proposed shall extend to Ireland, publication in the Dublin Gazette of the notice required by this section shall be requisite in addition

APP. III. to, or, if they extend to Ireland only, in lieu of, publication in the London Gazette.

Provisional rules in certain cases.

2. Where a rule-making authority certifies that on account of urgency or any special reason any rule should come into immediate operation, it shall be lawful for such authority to make any such rules to come into operation forthwith as provisional rules, but such provisional rules shall only continue in force until rules have been made in accordance with the foregoing provisions of this Act.

Printing, numbering, and sale of statutory rules.

3.—(1) All statutory rules made after the thirty-first day of December next after the passing of this Act shall forthwith after they are made be sent to the Queen's printer of Acts of Parliament, and shall, in accordance with regulations made by the Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, be numbered, and (save as provided by the regulations) printed, and sold by him.

(2) Any statutory rules may, without prejudice to any other mode of citation, be cited by the number so given as above mentioned and the calendar year.

(3) Where any statutory rules are required by any Act to be published or notified in the London, Edinburgh, or Dublin Gazette, a notice in the Gazette of the rules having been made, and of the place where copies of them can be purchased, shall be sufficient compliance with the said requirement.

The object of this provision was to save expense. Under the old system unnecessary expense was caused by the obligation to print the rules in two forms, one suitable to the London Gazette, the other for separate publication.

(4) Regulations under this section may provide for the different treatment of statutory rules which are of the nature of public Acts, and of those which are of the nature of local and personal or private Acts; and may determine the classes of cases in which the exercise of a statutory power by any rule-making authority constitutes or does not constitute the

making of a statutory rule within the meaning of this section, and may provide for the exemption from this section of any such classes. APP. III.

See these regulations below.

(5) In the making of such regulations, each Government department concerned shall be consulted, and due regard had to the views of that department.

4. In this Act—

‘Statutory rules’ means rules, regulations, or by-laws made under any Act of Parliament which (a) relate to any court in the United Kingdom, or to the procedure, practice, costs, or fees therein, or to any fees or matters applying generally throughout England, Scotland, or Ireland; or (b) are made by Her Majesty in Council, the Judicial Committee, the Treasury, the Lord Chancellor of Great Britain, or the Lord Lieutenant or the Lord Chancellor of Ireland, or a Secretary of State, the Admiralty, the Board of Trade, the Local Government Board for England or Ireland, the Chief Secretary for Ireland, or any other Government Department. ‘Rule-making authority’ includes every authority authorized to make any statutory rules.

Defini-
tions.

5. This Act may be cited as the Rules Publication Act, 1893. Short
title.

REGULATIONS made by the TREASURY with the concurrence of the LORD CHANCELLOR and the SPEAKER of the House of COMMONS in pursuance of the RULES PUBLICATION ACT, 1893.

Whereas by the Rules Publication Act, 1893, hereinafter referred to as ‘the Act,’ regulations are authorized to be made by the Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, for such purposes in relation to Statutory Rules as are therein mentioned. 56 & 57
Vict. c. 66.

Now, therefore, We, the Lords Commissioners of Her Majesty’s Treasury, in pursuance of the said Act, and of all other powers in that behalf, do

APP. III. hereby, with the concurrence of the Lord Chancellor and of the Speaker of the House of Commons, make the following regulations:—

1. Every exercise of a statutory power by a rule-making authority, which is of a legislative and not an executive character, shall be held to be a Statutory Rule within section three of the Act and these regulations.

2. An exercise of a statutory power which is confirmed only by a rule-making authority shall not be held to be a Statutory Rule within section three of the Act or these regulations.

3. Except as mentioned in Regulation 2, the volumes of Statutory Rules and Orders published by the Stationery Office in 1890, 1891, and 1892 shall form a practical guide for determining those exercises of statutory powers which should be treated as Statutory Rules within section three of the Act and these regulations.

4. A distinction shall be drawn between Statutory Rules which are general and those which are local and personal.

5. The distinction shall follow, unless in exceptional circumstances, that adopted between public Acts and local and personal Acts of Parliament.

6. All Statutory Rules when sent to the Queen's printer of Acts of Parliament, as required by the Act, shall be numbered consecutively as nearly as may be in the order in which they are received by the Queen's printer, and either with or without a second number for a particular class of rules.

7. The main series of numbers shall be a separate series for each calendar year, but Statutory Rules made in December in any year, and received by the Queen's printer of Acts of Parliament within 14 days after the end of that year, may be numbered with the Statutory Rules of that year and included in the annual volume of that year.

8. All Statutory Rules shall be printed and sold unless, in the case of rules not required to be published in any Gazette, the rule-making authority declare that it is unnecessary to print and sell them, and such declaration is not overruled on a reference under Regulation 15.

9. Statutory Rules similar to public general Acts shall be printed in an annual volume, and that volume shall include a list of the statutory rules which are similar to local and personal Acts.

10. The rule-making authority, in sending any statutory rule to the Queen's printer of Acts of Parliament, shall state whether they consider the rule to be general or local and personal, and that statement shall be followed unless overruled on a reference under Regulation 15.

11. In the annual volume of Statutory Rules the general rules shall be published in a classified form, as in the volumes mentioned above in Regulation 3 which have been hitherto published.

12. Regulations 6 and 8 shall apply to temporary statutory rules, but if they have ceased to be in force at the time of the publication of the annual volume, or will so cease a short time afterwards, they shall not be included in that volume, unless the rule-making authority inform the Queen's printer of Acts of Parliament that they desire them to be so included.

13. The Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, may direct the exclusion from publication at length in any annual volume, of any rules which it seems

to them unnecessary so to publish by reason of their annual or other periodical renewal ; as, for instance, the militia regulations, the volunteer regulations, or the education code. APP. III.

14. Any statutory rule or class of statutory rules which, on the application of the rule-making authority, may be determined by the Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, to be confidential, shall be exempted from section three of the Act and from these regulations.

15. Any question which arises under Regulation 8 as to the printing and sale of Statutory Rules, or under Regulation 10 as to Statutory Rules being general or local and personal, or which arises on the application or interpretation of these regulations, shall be referred to the Treasury, and determined by them with the concurrence of the Lord Chancellor and the Speaker of the House of Commons.

R. K. CAUSTON,
W. McARTHUR,
(Commissioners of Her Majesty's Treasury).

I concur,
HERSCHELL, C.

I concur,
ARTHUR W. PEEL,
Speaker.

August 9, 1894.



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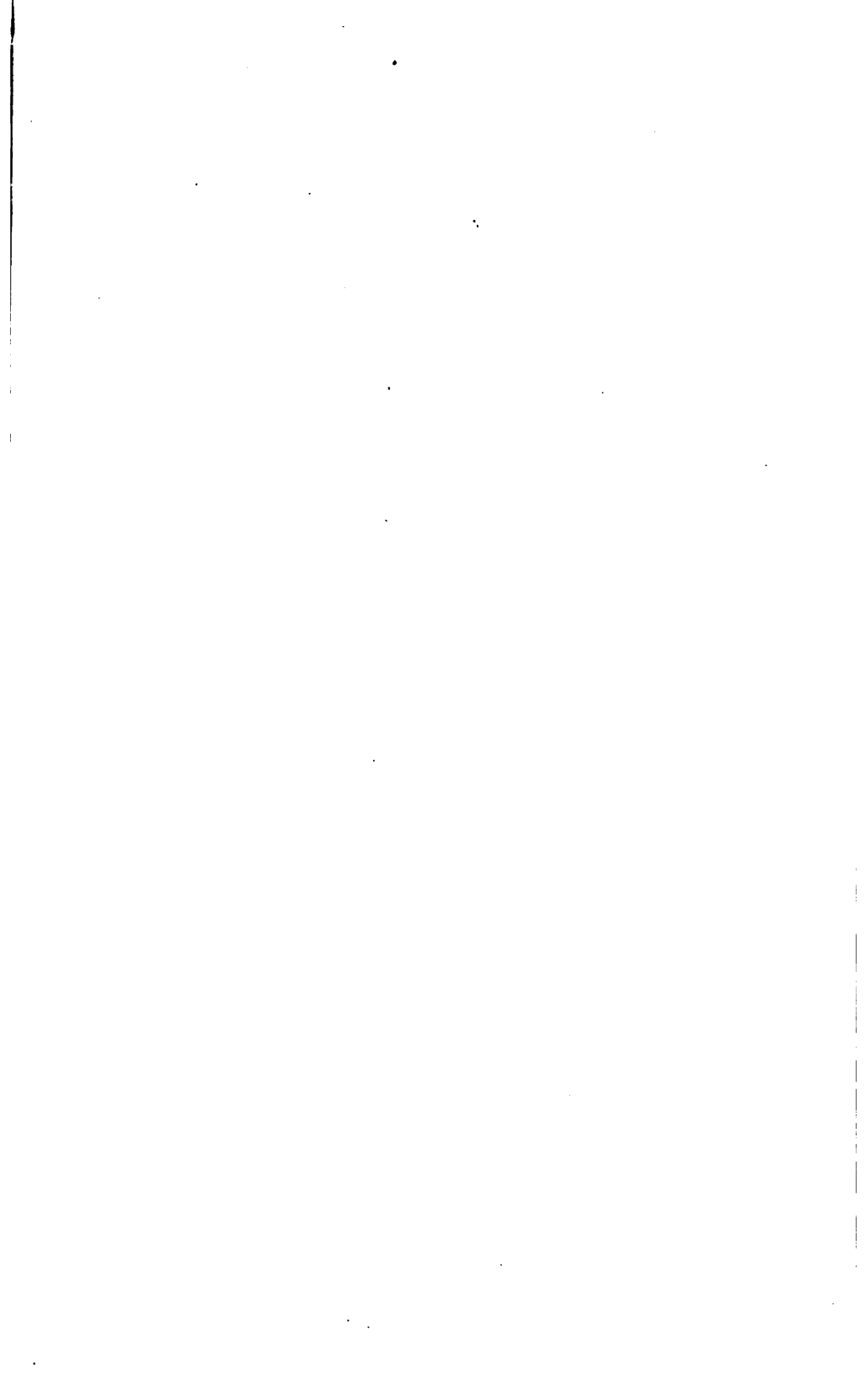
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